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Lawful Permanent Residency: A Potential Solution for Temporary Protected Status Holders in the Eastern District of New York

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LAWFUL PERMANENT RESIDENCY: A POTENTIAL SOLUTION FOR TEMPORARY PROTECTED STATUS HOLDERS IN THE EASTERN DISTRICT OF NEW YORK

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I. INTRODUCTION

In the United States, there are approximately 300,000 individuals from ten nations that have been granted Temporary Protected Status ("TPS") by the government.[1] TPS is a program that allows foreign nationals to remain legally in the United States because they are prevented from "returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."[2] The Trump Administration extended some TPS programs; however, the administration has terminated or not re-designated most TPS programs, leaving many individuals without a means of lawful status in the United States.[3] The terminations and non-re-designations[4] of TPS keeps President Trump's campaign

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[1] Kathryn Johnson & Peniel Ibe, *Trump Has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants: Here's What You Need to Know*, AM. FRIENDS SERV. COMM., https://www.afsc.org/blogs/news-and-commentary/trump-has-ended-temporary-protected-status-hundreds-thousands-immigrants (last updated Jan. 08, 2020).

[2] *See infra* text accompanying note 42.

[3] Johnson & Ibe, *supra* note 1.

[4] Termination of a TPS program is when the Secretary of Homeland Security has concluded that the conditions in which why a TPS program was created have been overcome or resolved and it is safe for a foreign national to return home. On the other hand, when a TPS program is re-designated by a Secretary of Homeland Security, the conditions in a foreign national's home country have not improved and a foreign national may apply for a continuation of his or her legal immigration status under the TPS program.

promise to reduce the number of immigrants in the United States.[5] Nonetheless, lawsuits were filed by foreign nationals to challenge the Trump administration's decision to end these programs.[6] For example, on March 12, 2018, Crista Ramos filed a complaint against the Secretary of Homeland Security, Kirstjen Nielsen, contesting the end of El Salvador, Haiti, Nicaragua, and Sudan TPS programs.[7] On October 3, 2018, in *Ramos v. Nielsen*,[8] the United States District Court for the Northern District of California ruled that these programs are to continue and the government is "[enjoined and restrained] from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, implementation and/or enforcement of the decisions to terminate TPS for Sudan, Haiti, El Salvador, and Nicaragua pending resolution of this case on the merits."[9]

Though causes of action have been filed against the administration to keep the TPS programs alive, lawsuits have been, and continue to be, filed to grant Legal Permanent Resident ("LPR") status to TPS visa holders.[10] On February 22, 2018, Amado de Jesus Moreno[11] filed a lawsuit in the Eastern District of New York ("E.D.N.Y.").[12] Mr. Moreno asked the court to grant TPS visa holders who live in the E.D.N.Y. and other districts across all circuits, via a class certification, the ability to go through the Adjustment of Status ("AOS") process so that a valid holder of TPS may receive a "Green

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[5] David Leblang, Ankita Satpathy, Alexa Iadarola, Ben Helms, Kelsey Hunt, Eric Xu, Rebecca Brough, & Mahesh Rao, *By Ending 'Temporary Protected Status' for Half a Million People, Trump has Probably Increased Illegal Migration*, THE WASHINGTON POST, (Aug. 07, 2018, 7:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/07/by-ending-temporary-protected-status-for-half-a-million-people-trump-has-probably-increased-illegal-migration/?utm_term=.c206de9273e5.

[6] Laura D. Francis, *Trump's Immigration Comments Again at Play in Federal Lawsuit*, BLOOMBERG LAW, (Aug. 07, 2018, 9:28 AM), https://news.bloomberglaw.com/daily-labor-report/trumps-immigration-comments-again-at-play-in-federal-lawsuit.

[7] Andrea Castillo, *San Francisco Judge Suspends Trump Administration's Decision to End Protected Status for Hundreds of Thousands of Immigrants*, LOS ANGELES TIMES, (Oct. 03, 2018, 8:45 PM), http://www.latimes.com/local/california/la-me-ln-tps-immigrant-decision-20181003-story.html.

[8] 336 F. Supp. 3d 1075 (N.D. Cal. 2018).

[9] *Id.* at 1108.

[10] American Immigration Council, *Ending Obstacles for Temporary Protected Status Recipients Seeking Legal Permanent Residence*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/litigation/ending-obstacles-temporary-protected-status-recipients-seeking-legal-permanent-residence (last visited Feb. 17, 2020).

[11] Moreno v. Nielsen, No. 1:18-cv-01135-RRM, 2019 WL 653139, at *1 (E.D.N.Y. Feb. 15, 2019).

[12] *Id.*

Card."[13] Nevertheless, even without class certification, if TPS holders within the E.D.N.Y. are not granted the opportunity to go through the AOS process, it would most likely have a negative mass effect within the foreground and background of the District.[14] For instance, once a beneficiary's TPS is over, it opens him or herself up to deportation.[15] Thus, the recipient of TPS would not have a legal avenue of remaining in the United States.[16]

The named plaintiff, Amada de Jesus Moreno, is a foreign national from El Salvador.[17] Mr. Moreno came to the United States and Entered Without Inspection ("EWI")[18] in 2000.[19] In 2001, the government granted Mr. Moreno TPS and has maintained valid status since.[20] In 2011, Mr. Moreno was granted by the United States Citizenship and Immigration Services ("USCIS") an I-131, "Application for Travel Document" ("Advance Parole")[21] petition, so that he may travel to El Salvador.[22] Later in the year, Mr. Moreno left the United States and returned in July 2011.[23] When he returned to the

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[13] *Id.* at *2.

[14] *See infra* note 42.

[15] *See infra* note 42.

[16] *Id.*

[17] *Moreno*, 2019 WL 653139, at *1.

[18] According to the 8 U.S.C. § 1225(a)(3) (2009), "[a]ll aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers." In other words, to gain lawful admission into the United States, a citizen of another country must be inspected and admitted by an immigration official. An immigration official will physically review a foreign national's documents ("inspection") and allow him or her entry into the United States ("admission"). If a foreign national is not inspected and admitted, he or she is deemed to have Entered Without Inspection. The easiest way for an individual to determine if he or she entered the United States lawfully is to check the Government's I-94 website. *See I-94 Website: Travel Records for U.S. Visitors*, U.S. CUSTOMS & BORDER PROTECTION, https://i94.cbp.dhs.gov/I94/#/home (last visited May 15, 2020).

[19] *Moreno*, 2019 WL 653139, at *1.

[20] *Id.*

[21] As the USCIS states, the purpose of Advance Parole for foreign nationals is to "[u]se this form to apply for a re-entry permit, refugee travel document, or advance parole travel document, to include parole into the U.S. for humanitarian reasons." *I-131, Application for Travel Document*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/i-131 (last updated May 07, 2020).

[22] *Moreno*, 2019 WL 653139, at *1.

[23] *Id.*

country, the United States Customs and Border Protection ("CBP") officer inspected and paroled[24] Mr. Moreno as a TPS beneficiary.[25]

On or about January 2013, Mr. Moreno's employer, Jersey Lynne Farms Inc., filed an immigrant visa application for Mr. Moreno with the USCIS.[26] The USCIS granted the petition in November 2014, thus making Mr. Moreno eligible under the 8 U.S.C. Section 1153(b)(3)(A)(i),[27] as a "skilled worker."[28] With his newly approved visa, Mr. Moreno filed an I-485, "Application to Register Permanent Residence or Adjust Status,"[29] in January 2015.[30] In April 2017, the USCIS denied Mr. Moreno's application.[31] The government deemed Mr. Moreno ineligible to go through the AOS process because he failed to maintain lawful status from the date he originally entered in the United States.[32] Mr. Moreno filed a timely appeal to the USCIS and requested the decision be reopened by the government.[33] Mr. Moreno contested that because he was paroled back into the United States in 2011, he had satisfied the requirements of 8 U.S.C. Section 1255(k),[34] thus making him exempt under 8 U.S.C. Section 1255(c),[35] which bars a foreign national from adjusting his status because of an unlawful presence within the United States.[36]

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[24] *See supra* text accompany note 18 and note 21. When a foreign national is "inspected," a government official, whether it be a customs officer or another government official/agency (e.g. USCIS), reviews the bona fides of the individual requesting entry into the United States and grants him or her entry. When a foreign national is "paroled," he or she has received a re-entry permit into the United States. An Advance Paroled document is issued to an individual who has applied for the Adjustment of Status process, however, he or she has yet to receive an immigrant visa ("Green Card"). Together, when a foreign national is "inspected and paroled," he or she has gained lawful admission into the United States.

[25] *Moreno*, 2019 WL 653139, at *1.

[26] *Id.* at *2.

[27] *See* 8 U.S.C. § 1153(b)(3)(A)(i) (2006).

[28] *Moreno*, 2019 WL 653139, at *2.

[29] According to the USCIS, the I-485 calls for a foreign national to "[u]se this form to apply for lawful permanent resident status if you are in the United States." *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/i-485 (last updated Apr. 20, 2020).

[30] *Moreno*, 2019 WL 653139, at *2.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See* 8 U.S.C. § 1255(k) (2009). This section in the United States Code discusses the impracticality of fixed provisions for certain types of employment-based immigrants. The overall 8 U.S.C. § 1255 statute establishes who is eligible for AOS and how an admitted nonimmigrant visa holder may obtain permanent residency.

[35] *See* 8 U.S.C. § 1255(c).

[36] *Moreno*, 2019 WL 653139, at *2.

In July 2017, the USCIS denied Mr. Moreno's appeal and found Mr. Moreno ineligible under 8 U.S.C. Section 1255(k).[37] The USCIS argued that Mr. Moreno was ineligible because reentering the United States on Advance Parole does not constitute admission into the United States.[38] Additionally, the USCIS contended that Mr. Moreno initially entered the United States without inspection by a government official, thus making him ineligible for the exemption based in 8 U.S.C. Section 1255(k).[39] Because of the denial on appeal, the *Moreno v. Nielsen* suit followed.[40] Mr. Moreno and other individuals, in a class suit against the government, contend that the USCIS should have treated their granting of TPS as an "inspection and admission" for his AOS petition.[41]

The court, in this case, should hold in its final ruling that a foreign national meets the "inspection and admission" requirement when the government grants him or her TPS status, even if the foreign national entered without "inspection and admission" when he or she first entered the United States. A foreign national must go through the AOS process because of the various cancellations and non-re-designations of TPS programs by the Trump administration. Even if the court denies a class certification, the court should allow the named plaintiff (and others in the E.D.N.Y.) the opportunity to go through the AOS process. It is imperative that the AOS process moves forward because once a TPS program ends, it officially terminates the legal status a foreign national has in the United States, thus making an individual subject to removal proceedings and deportation.[42]

II. ROADMAP

In this article, Part III will explain what TPS is and who is eligible for the program(s). Part IV will elaborate on what is AOS and

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[37] *Id.*

[38] *Id.*

[39] *Id.*; *see supra* text accompanying note 34.

[40] *Moreno*, 2019 WL 653139, at *2.

[41] *Id.*

[42] If a TPS visa holder loses lawful status, it could have significant consequences for the holder themselves and their families. TPS holders and their families, for example, would likely go into hiding as to avoid Immigration and Customs Enforcement ("ICE"). Additionally, for the older TPS programs and holders, years of establishing oneself in the United States would be lost. A holder would be sent to their original nation in which he or she might not recognize anymore because of all the time he or she had spent in the United States building a new life.

the filing process. Part V will discuss the various TPS programs and legislation in Congress to create a new TPS program. Part VI will discuss, elaborate, and analyze all cases that focus on whether a TPS recipient has the right and the ability to go through the Adjustment of Status process. Part VII will discuss the facts of *Moreno v. Nielsen* further. Part VIII will analyze and incorporate the applicable case and statutory law to the case at hand and how the E.D.N.Y. should rule. Lastly, Part IX will conclude the Note.

III. WHAT IS TPS? WHO IS ELIGIBLE?

Congress created the TPS program under the Immigration Act of 1990.[43] Congress developed TPS to provide foreign nationals the ability to obtain special visas that allow holders to remain legally in the United States.[44] The program operates as a refuge for foreign nationals whose home country experiences or has experienced some catastrophic event.[45] Reasons for granting the special visas under TPS include, but are not limited to, political turmoil, natural disasters, famine, and others.[46] TPS provides relief from the fear of being deported.[47] Nonetheless, to receive TPS, a foreign national must be eligible for the program and meet all its requirements.[48]

A person is eligible for TPS when the Secretary of Homeland Security needs to designate that a foreign national's home country is unfit to live.[49] In determining which country is to receive a

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[43] Nick Miroff, *What is TPS, and What Will Happen to the 200,000 Salvadorans Whose Status is Revoked?*, THE WASH. POST, (Jan. 09, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/01/09/what-is-tps-and-what-will-happen-to-the-200000-salvadorans-whose-status-is-revoked/?utm_term=.eac6e11744cd; *see* Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978, 5029 (1990).

[44] *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status (last updated Mar. 30, 2020).

[45] *Id.*

[46] *Id.*; *see* 8 U.S.C. § 1254a(b).

[47] *Temporary Protected Status*, *supra* note 44.

[48] *Id.*

[49] *See* 8 U.S.C. § 1254a. Formerly, the Attorney General had the power to designate and grant TPS. In 8 U.S.C. § 1254a, the statute references the Attorney General, not the Secretary of Homeland Security. The power to designate TPS from the Attorney General to the Secretary of Homeland Security was in 2002. *See* Homeland Security Act of 2002, Pub L. No. 107-296, 116 Stat. 2135, 2311 (2002). Section 1517, codified at 6 U.S.C. § 557 (2015) provides: [W]ith respect to any function transferred by or under this chapter (including under a reorganization plan that becomes effective under section 542 of this title) and exercised on or after the effective date of this chapter, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall

designation, the Secretary of Homeland Security looks to many factors.[50] Before making a discretionary determination in issuing a designation, the Secretary of Homeland Security consults the appropriate government agencies.[51] Once the Secretary of Homeland Security designates a country as unfit to live, a foreign national must meet additional requirements.[52] For example, one requirement is that a foreign national must have continually resided in the United States since the foreign national's home country was designated.[53] Also, 8 U.S.C. 1254a(c)(1)(A)(i) establishes another requirement that a foreign national must have "been continuously physically present in the United States since the effective date of the most recent designation of that state."[54]

IV. WHAT IS ADJUSTMENT OF STATUS? WHAT IS THE FILING PROCESS?

Adjustment of Status is the process in which a foreign national who possesses a nonimmigrant visa applies to become an LPR.[55] AOS is also the process in which an individual obtains a "Green Card."[56] Under 8 U.S.C. Section 1255, the statute establishes the foundation of who is eligible for AOS and how lawfully admitted nonimmigrant visa holders might obtain permanent residency.[57] There are numerous categories in which a foreign national may be eligible to apply to go through the AOS process.[58] For instance, an individual may file a petition for a Green Card based on family, employment, asylum, human trafficking, and other categories.[59] To apply, the foreign

be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred.

[50] *See supra* note 46.

[51] *See* 8 U.S.C. § 1254a(b)(1) (2018). The statute does not specify which agencies, the Department of State or the Department of Justice, the Secretary of Homeland Security would consult in making his or her determination.

[52] *Temporary Protected Status*, *supra* note 44.

[53] *See supra* note 46.

[54] 8 U.S.C. § 1254a(c)(1)(A)(i); *see supra* note 4 for termination of a TPS program.

[55] *Adjustment of Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/greencard/adjustment-of-status (last updated Jan. 11, 2018).

[56] *Id.*

[57] *See* 8 U.S.C. § 1255 (2009). The statute section is also known as "Adjustment of Status of Nonimmigrant to That of Person Admitted for Permanent Residence." *Id.*

[58] *Adjustment of Status*, *supra* note 55.

[59] *Green Card Eligibility Categories*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/greencard/eligibility-categories (last updated May 15, 2020). TPS is

national must submit the I-485[60] and the appropriate Green Card petition[61] to the USCIS.[62]

Some Green Card applications must be approved first before filing an I-485; however, some Green Card categories allow a foreign national to file both petitions, "concurrently."[63] "Concurrent filing" is when an adjustment application and an immigrant petition are filed together to the appropriate filing location and with the applicable fees.[64] Concurrent filing is permissive only in a few cases.[65] For example, the petitioners can concurrently file when they are immediate relatives of a United States citizen, if an immigrant visa is immediately available (for family and employment-based Green Cards), the abusive parent or spouse is a United States citizen, et cetera.[66] Nevertheless, all concurrently filed petitions are subject to the immediate availability of an immigrant visa, except if a foreign national is an immediate relative to a United States citizen.[67]

In determining if an immigrant visa is readily available, generally for employment and family-based Green Cards, the Department of State ("DOS") publishes a monthly Visa Bulletin,[68] which "indicates when statutorily limited visas are available to prospective immigrants based on their individual priority date."[69] Additionally, "[t]he priority date is generally the date when the applicant's relative or employer properly filed the immigrant visa

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not listed as an eligible category in the statute nor on the USCIS website; however, according to the USCIS, a foreign national is not prohibited for filing for AOS because he or she simply has a TPS visa. *See Temporary Protected Status*, *supra* note 44. What is the general issue is whether a TPS recipient is eligible to go through the process as a whole because he or she may or may not be deemed lawfully admitted to the United States at the time the foreign national entered the United States without inspection?

[60] *See supra* text accompanying note 29.

[61] *See Adjustment of Status*, *supra* note 55. There are various Green Card forms. For example, the I-130, the I-140, the I-918, et cetera.

[62] *Id.*

[63] *Id.*

[64] *Concurrent Filing of Form I-485*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/greencard/concurrent-filing-form-i-485 (last updated Feb. 02, 2017).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html (last visited Feb. 17, 2020).

[69] *USCIS Announces Revised Procedures for Determining Visa Availability for Applicants Waiting to File for Adjustment of Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., *archived at* https://www.uscis.gov/archive/uscis-announces-revised-procedures-determining-visa-availability-applicants-waiting-file-adjustment-status (last updated Sept. 09, 2015).

petition on the applicant's behalf with USCIS."[70] Also, "[i]f a labor certification is required to be filed with the applicant's immigrant visa petition, then the priority date is when the labor certification[71] application was accepted for processing by Department of Labor."[72] Statutorily, only 226,000 family-based Green Cards are immediately available each year.[73] Furthermore, the Immigration and Nationality Act only allows for 140,000 Green Cards, which are immediately available each year.[74] Moreover, "[b]oth categories are further divided into several sub-categories, each of which receives a certain percentage of the overall visa numbers as prescribed by law. . . . [T]here are limits to the percentage of visas that can be allotted based on an immigrant's country of chargeability (usually the country of birth)."[75]

Once a petitioner applies, whether it is a single form, or it is concurrently filed, the USCIS sends a written confirmation that it received and is processing the application.[76] Thusly, this begins the long and arduous journey of becoming an LPR.

V. TPS PROGRAMS

As of October 2019, there are currently ten active TPS programs that the government expects to end, have not been re-designated, or are extended through 2021.[77] The active TPS programs include El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.[78]

Table 1 shows why each country received a TPS designation.

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[70] *Id.*

[71] *See* case cited *infra* note 447.

[72] *Id.*

[73] *See* 8 U.S.C. § 1151(c)(1)(B)(ii) (2009).

[74] *See id.* § 1151(d)(1)(A).

[75] *Visa Availability and Priority Dates*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/greencard/visa-availability-priority-dates (last updated Nov. 05, 2015).

[76] *See Adjustment of Status*, *supra* note 55.

[77] *Temporary Protected Status*, *supra* note 44.

[78] *Id.*

Table 1.

Country:	**Reason for Designation:**
El Salvador	**Earthquake**[79]
Haiti	**Earthquake**[80]
Honduras	**Hurricane**[81]
Nepal	**Earthquake**[82]
Nicaragua	**Hurricane**[83]
Somalia	**Armed Conflict**[84]
Sudan	**Armed Conflict**[85]
South Sudan	**Armed Conflict**[86]
Syria	**Armed Conflict**[87]
Yemen	**Armed Conflict**[88]

Table 2 shows when the Secretary of Homeland Security/Attorney General[89] granted a country a TPS designation, its re-designation (if applicable), and its termination or its extension.

[79] Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214, 14,214-16 (Mar. 09, 2001), https://www.govinfo.gov/content/pkg/FR-2001-03-09/pdf/01-5818.pdf.

[80] Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476, 3476-79 (Jan. 21, 2010), https://www.govinfo.gov/content/pkg/FR-2010-01-21/pdf/2010-1169.pdf.

[81] Designation of Honduras Under Temporary Protected Status, 64 Fed. Reg. 524, 524-26 (Jan. 05, 1999), https://www.govinfo.gov/content/pkg/FR-1999-01-05/pdf/98-34849.pdf.

[82] Designation of Nepal for Temporary Protected Status, 80 Fed. Reg. 36,346, 36,346-50 (June 24, 2015*),* https://www.govinfo.gov/content/pkg/FR-2015-06-24/pdf/2015-15576.pdf.

[83] Designation of Nicaragua Under Temporary Protected Status, 64 Fed. Reg. 526, 526-28 (Jan. 05, 1999), https://www.govinfo.gov/content/pkg/FR-1999-01-05/pdf/98-34848.pdf.

[84] Designation of Nationals of Somalia for Temporary Protected Status, 56 Fed. Reg. 46,804, 46,804-05 (Sept. 16, 1991), https://www.govinfo.gov/content/pkg/FR-1991-09-16/pdf/FR-1991-09-16.pdf.

[85] Designation of Sudan Under Temporary Protected Status, 62 Fed. Reg. 59,737, 59,737-38 (Nov. 04, 1997), https://www.govinfo.gov/content/pkg/FR-1997-11-04/pdf/97-29077.pdf.

[86] Designation of Republic of South Sudan for Temporary Protected Status, 76 Fed. Reg. 63,629, 63,629-35 (Oct. 13, 2011), https://www.govinfo.gov/content/pkg/FR-2011-10-13/pdf/2011-26537.pdf.

[87] Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19,026, 19,026-30 (Mar. 29, 2012), https://www.govinfo.gov/content/pkg/FR-2012-03-29/pdf/2012-7498.pdf. On April 03, 2012, the USCIS issued a correction to its regulation amending some dates that were incorrect in the March 29, 2012 regulation. *See* Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 20,046, 20,046 (Apr. 03, 2012), https://www.govinfo.gov/content/pkg/FR-2012-04-03/pdf/C1-2012-7498.pdf.

[88] Designation of the Republic of Yemen for Temporary Protected Status, 80 Fed. Reg. 53319, 53319-23 (Sept. 03, 2015), https://www.govinfo.gov/content/pkg/FR-2015-09-03/pdf/2015-21881.pdf.

[89] *See supra* note 49.

Table 2.[90]

Country:	**Designation of TPS:**	**Most Recent Re-designation:**	**Termination date (T) or Extended through (E):**
El Salvador[91]	**March 09, 2001**	**July 08, 2016**[92]	**T: January 04, 2021**[93]
Haiti[94]	**January 21, 2010**	**May 24, 2017**[95]	**T: January 04, 2021**[96]

[90] At the time of publication submission, the dates provided in Table 2 on the re-designation, termination, or extension of a TPS program were the current dates of all programs. Certain dates are subject to change post-publication submission.

[91] *Temporary Protected Status Designated Country: El Salvador*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador (last updated Nov. 01, 2019).

[92] Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,645-51 (July 08, 2016), https://www.federalregister.gov/documents/2016/07/08/2016-15802/extension-of-thedesignation-of-el-salvador-for-temporary-protected-status.

[93] The termination of the El Salvador TPS program has currently been placed on hold because of the ruling from Ramos v. Nielsen. 336 F. Supp. 3d 1075 (N.D. Cal. 2018). According to the Federal Registrar, the El Salvador TPS program has been extended until January 04, 2021 as Ramos makes its way through the courts. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59,403, 59,403-10 (Nov. 04, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf.

[94] *Temporary Protected Status Designated Country: Haiti*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti (last updated Nov. 01, 2019).

[95] Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,830-37 (May 24, 2017), https://www.govinfo.gov/content/pkg/FR-2017-05-24/pdf/2017-10749.pdf.

[96] The termination of the Haiti TPS program has currently been placed on hold because of the ruling from Ramos v. Nielsen. 336 F. Supp. 3d 1075 (N.D. Cal. 2018). According to the Federal Registrar, the Haiti TPS program has been extended until January 04, 2021 as *Ramos* makes its way through the courts. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59,403, 59,403-10 (Nov. 04, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf. In Saget v. Trump, the Eastern District of New York further enjoined the government from terminating the Haiti TPS program, pending the final merits of the case. 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

Honduras[97]	**January 09, 1999**	**December 15, 2017**[98]	**T: January 04, 2021**[99]
Nepal[100]	**June 24, 2015**	**October 26, 2016**[101]	**T: January 04, 2021**[102]
Nicaragua[103]	**January 05, 1999**	**May 16, 2016**[104]	**T: January 04, 2021**[105]

[97] *Temporary Protected Status Designated Country: Honduras*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras (last updated Nov. 01, 2019).

[98] Extension of the Designation of Honduras for Temporary Protected Status, 82 Fed. Reg. 59630, 59630-36 (Dec. 15, 2017), https://www.govinfo.gov/content/pkg/FR-2017-12-15/pdf/2017-27140.pdf.

[99] According to the Federal Registrar, the Honduras TPS program has been extended until January 04, 2021. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59,403, 59,403-10 (Nov. 4, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf. Additionally, in Bhattarai v. Nielsen, the Northern District of California issued an order that further enjoined the termination of Honduras TPS program and halted the termination of Temporary Protected Status for foreign nationals from Nepal. Order Stipulating to Stay Proceedings, Bhattarai v. Nielsen, No. 19–cv–00731-EMC (N.D. Cal. Mar. 12, 2019).

[100] *Temporary Protected Status Designated Country: Nepal*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nepal (last updated Nov. 01, 2019).

[101] Extension of the Designation of Nepal for Temporary Protected Status, 81 Fed. Reg. 74,470, 74,470-75 (Oct. 26, 2016), https://www.govinfo.gov/content/pkg/FR-2016-10-26/pdf/2016-25907.pdf.

[102] Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59,403, 59,403-10 (Nov. 04, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf. Moreover, in Bhattarai v. Nielsen, the Northern District of California issued an order that further enjoined the termination of Honduras TPS program and halted the termination of Temporary Protected Status for foreign nationals from Nepal. Order Stipulating to Stay Proceedings, Bhattarai v. Nielsen, No. 19–cv–00731-EMC (N.D. Cal. Mar. 12, 2019).

[103] *Temporary Protected Status Designated Country: Nicaragua*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nicaragua (last updated Nov. 01, 2019).

[104] Extension of the Designation of Nicaragua for Temporary Protected Status, 81 Fed. Reg. 30,325, 30,325-31 (May 16, 2016), https://www.govinfo.gov/content/pkg/FR-2016-05-16/pdf/2016-11305.pdf.

[105] The termination of the Nicaragua TPS program has currently been placed on hold because of the ruling from Ramos v. Nielsen. 336 F. Supp. 3d 1075 (N.D. Cal. 2018). According to the Federal Registrar, the Nicaragua TPS program has been extended until January 04, 2021. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59,403, 59,403-10 (Nov. 04, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf.

Somalia[106]	**September 16, 1991**	**August 27, 2018**[107]	**E: September 17, 2021**[108]
Sudan[109]	**November 04, 1997**	**January 25, 2016**[110]	**T: January 04, 2021**[111]
South Sudan[112]	**November 03, 2011**	**September 21, 2017**[113]	**E: November 02, 2020**[114]
Syria[115]	**March 29, 2012**	**August 01, 2019**[116]	**E: March 31, 2021**[117]

[106] *Temporary Protected Status Designated Country: Somalia*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-somalia (last updated Mar. 11, 2020).

[107] Extension of the Designation of Somalia for Temporary Protected Status, 83 Fed. Reg. 43,695, 43,695-00 (Aug. 27, 2018), https://www.govinfo.gov/content/pkg/FR-2018-08-27/pdf/2018-18444.pdf.

[108] Extension of the Designation of Somalia for Temporary Protected Status, 85 Fed. Reg. 14,229, 14,229-35 (Mar. 11, 2020), https://www.govinfo.gov/content/pkg/FR-2020-03-11/pdf/2020-04976.pdf.

[109] *Temporary Protected Status Designated Country: Sudan*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan (last updated Nov. 01, 2019).

[110] Extension of the Designation of Sudan for Temporary Protected Status, 81 Fed. Reg. 4045, 4045-51 (Jan. 25, 2016), https://www.govinfo.gov/content/pkg/FR-2016-01-25/pdf/2016-01387.pdf.

[111] The termination of the Sudan TPS program has currently been placed on hold because of the ruling from Ramos v. Nielsen. 336 F. Supp. 3d 1075 (N.D. Cal. 2018). According to the Federal Registrar, the Sudan TPS program has been extended until January 04, 2021. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59403, 59403-10 (Nov. 04, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf.

[112] *Temporary Protected Status Designated Country: South Sudan*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-south-sudan (last updated Mar. 30, 2020).

[113] Extension of South Sudan for Temporary Protected Status, 82 Fed. Reg. 44,205, 44,205-11 (Sept. 21, 2017), https://www.govinfo.gov/content/pkg/FR-2017-09-21/pdf/2017-20174.pdf.

[114] Extension of the Designation of South Sudan for Temporary Protected Status, 84 Fed. Reg. 13688, 13688-94 (Apr. 05, 2019), https://www.govinfo.gov/content/pkg/FR-2019-04-05/pdf/2019-06746.pdf.

[115] *Temporary Protected Status Designated Country: Syria*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-syria (last updated Mar. 30, 2020).

[116] Extension of the Designation of Syria for Temporary Protected Status, 84 Fed. Reg. 49,751, 49,751-57 (Sept. 23, 2019), https://www.govinfo.gov/content/pkg/FR-2019-09-23/pdf/2019-20457.pdf.

[117] *Id.*

Yemen[118]	**March 04, 2017**	**August 14, 2018**[119]	**E: September 03, 2021**[120]

Table 3 shows why a country was terminated (or, in some cases, originally terminated, but the termination is on hold because of a court order) or why a country was granted an extension of TPS by the Secretary of Homeland Security.

Table 3.

Country:	**Reason for Termination (T) or Extension (E):**
El Salvador	**T: Conditions post-earthquake make it permissible for El Salvadorian nationals to return home safely.**[121]
Haiti	**T: Conditions post-earthquake make it permissible for Haitian nationals to return home safely.**[122]
Honduras	**T: Conditions post-hurricane make it permissible for Hondurans nationals to return home safely.**[123]

[118] *Temporary Protected Status Designated Country: Yemen*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-yemen (last updated Mar. 02, 2020).

[119] Extension of the Designation of Yemen for Temporary Protected Status, 83 Fed. Reg. 40,307, 40,307-13 (Aug. 14, 2018), https://www.govinfo.gov/content/pkg/FR-2018-08-14/pdf/2018-17556.pdf.

[120] Extension of the Designation of Yemen for Temporary Protected Status, 85 Fed. Reg. 12,313, 12,313-19 (Mar. 02, 2020), https://www.govinfo.gov/content/pkg/FR-2020-03-02/pdf/2020-04355.pdf.

[121] Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2654-60 (Jan. 18, 2018), https://www.govinfo.gov/content/pkg/FR-2018-01-18/pdf/2018-00885.pdf. On January 22, 2018, the USCIS issued a correction to its regulation amending some dates that were incorrect in the January 18, 2018 regulation. *See* Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 3014, 3014 (Jan. 22, 2018), https://www.govinfo.gov/content/pkg/FR-2018-01-22/pdf/C1-2018-00885.pdf. Again, the termination is on hold as Ramos v. Nielsen. 336 F. Supp. 3d 1075 (N.D. Cal. 2018), makes its way through the court system.

[122] Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648, 2648-54 (Jan. 18, 2018), https://www.govinfo.gov/content/pkg/FR-2018-01-18/pdf/2018-00886.pdf; *see supra* note 96.

[123] *See supra* note 99.

Nepal	**T: Conditions post-earthquake make it permissible for Nepalese nationals to return home safely.**[124]
Nicaragua	**T: Conditions post-hurricane make it permissible for Nicaraguans nationals to return home safely.**[125]
Somalia	**E: Ongoing armed conflict prevents Somali nationals from returning home safely.**[126]
Sudan	**T: Ongoing armed conflict does not prevent Sudanese nationals from returning home safely.**[127]
South Sudan	**E: Ongoing civil war prevents South Sudanese nationals from returning home safely.**[128]
Syria	**E: Ongoing civil war prevents Syrian nationals from returning home safely.**[129]
Yemen	**E: Ongoing armed conflict prevents Yemeni nationals from returning home safely.**[130]

The Secretary of Homeland Security extended three other TPS programs for approximately six months in September 2016; however, Guinea, Liberia, and Sierra Leone were effectively terminated.[131]

[124] *See supra* note 102.

[125] Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636, 59,636-42 (Dec. 15, 2017), https://www.govinfo.gov/content/pkg/FR-2017-12-15/pdf/2017-27141.pdf; *see supra* note 105.

[126] *See supra* note 108.

[127] Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228, 47,228-34 (Oct. 11, 2017), https://www.govinfo.gov/content/pkg/FR-2017-10-11/pdf/2017-22074.pdf; *see supra* note 111.

[128] *See supra* note 114.

[129] *See supra* note 117.

[130] *See supra* note 120.

[131] *Temporary Protected Status Designated Country: Guinea*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-guinea (last updated Apr. 19, 2017). When a TPS program is "effectively terminated," the program in essence has reached its termination date. Foreign nationals who had legal Temporary Protected Status no longer has its protection and is subject deportation due to unlawful status in the United States.

Originally, the Guinea, Liberia, and Sierra Leone TPS programs were created by the Secretary of Homeland Security because of the widespread transmission of the Ebola virus.[132] The spread of the virus was contained, and it has become safe for a foreign national to return to their home country, so Secretary Jeh Johnson effectively terminated these TPS programs.[133] The programs ended on May 21, 2017.[134] Other past and terminated TPS programs include Angola,[135] Bosnia-

[132] *Temporary Protected Status Designated Country: Liberia*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status-designated-country-liberia (last updated Apr. 19, 2017).

[133] *Temporary Protected Status Designated Country: Sierra Leone*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sierra-leone (last updated Apr. 19, 2017).

[134] *USCIS Reminds Beneficiaries of Temporary Protected Status for Guinea, Libera, and Sierra Leone of May 21 Termination*, U.S. CITIZENSHIP AND IMMIGR. SERVS., *archived at* https://www.uscis.gov/news/alerts/uscis-reminds-beneficiaries-temporary-protected-status-guinea-liberia-and-sierra-leone-may-21-termination (last updated Apr. 19, 2017). It is important to note that these programs ended as compared to the ones that are expected to end because in Guinea, Liberia, and Sierra Leone it was deemed by the Secretary of Homeland Security safe for foreign nationals to return home because the Ebola virus was nearly or completely eradicated. On the other hand, with the current active TPS programs, the various countries from which foreign nationals' hail, the issue of why the country was originally designated TPS has yet to find a remedy/solution, thus making it difficult for a foreign national to return home.

[135] Termination of the Designation of Angola for Temporary Protected Status, 68 Fed. Reg. 3896, 3896-97 (Jan. 27, 2003), https://www.govinfo.gov/content/pkg/FR-2003-01-27/pdf/03-1994.pdf.

Herzegovina,[136] Burundi,[137] Guinea-Bissau,[138] Province of Kosovo,[139] Kuwait,[140] Lebanon,[141] Montserrat,[142] and Rwanda.[143]

On January 15, 2019, the bi-partisan "Venezuela Temporary Protected Status Act of 2019" was introduced in the United States House of Representatives.[144] New Jersey Senator Robert Menendez introduced an identical bill in the United States Senate on February 28, 2019.[145] If passed by Congress and signed by the President, the bill would give TPS to Venezuelans who meet the statutes' criteria for eighteen months, provide Venezuelans TPS recipients with work authorization and travel documents for extenuating circumstances, and direct the Secretary of State and the Secretary of Homeland Security to work with countries that surround Venezuela to help improve migration of asylum seekers to that country.[146] Congress is introducing legislation to help Venezuelan nationals because of the unprecedented

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[136] Termination of the Designation of Bosnia-Herzegovina for Temporary Protected Status, 65 Fed. Reg. 52,789, 52,789-91 (Aug. 30, 2000), https://www.govinfo.gov/content/pkg/FR-2000-08-30/pdf/00-22138.pdf.

[137] Termination of the Designation of Burundi for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Burundi TPS Beneficiaries, 72 Fed. Reg. 61,172, 61,172-77 (Oct. 29, 2007), https://www.govinfo.gov/content/pkg/FR-2007-10-29/pdf/E7-21128.pdf.

[138] Six-Month Extension and Termination of Designation of Guinea- Bissau Under the Temporary Protected Status Program, 65 Fed. Reg. 15,016, 15,016-18 (Mar. 20, 2000), https://www.govinfo.gov/content/pkg/FR-2000-03-20/pdf/00-6750.pdf.

[139] Termination of the Province of Kosovo in the Republic of Serbia in the State of the Federal Republic of Yugoslavia (Serbia-Montenegro) Under the Temporary Protected Status Program, 65 Fed. Reg. 33,356, 33,356-57 (May 23, 2000), https://www.govinfo.gov/content/pkg/FR-2000-05-23/pdf/00-12856.pdf.

[140] Termination of the Designation of Kuwait under Temporary Protected Status, 57 Fed. Reg. 2930, 2930-31 (Jan. 24, 1992), http://cdn.loc.gov/service/ll/fedreg/fr057/fr057016/fr057016.pdf.

[141] Termination of the Designation of Lebanon under Temporary Protected Status, 58 Fed. Reg, 7582, 7582 (Feb. 08, 1993), http://cdn.loc.gov/service/ll/fedreg/fr058/fr058024/fr058024.pdf.

[142] Termination of the Designation of Montserrat Under the Temporary Protected Status Program; Extension of Employment Authorization Documentation, 69 Fed. Reg. 40,642, 40,642-45 (July 06, 2004), https://www.govinfo.gov/content/pkg/FR-2004-07-06/pdf/04-15243.pdf.

[143] Termination of Designation of Rwanda Under Temporary Protected Status Program After Final 6-Month Extension, 62 Fed. Reg. 33,442, 33,442-43 (June 19, 1997), https://www.govinfo.gov/content/pkg/FR-1997-06-19/pdf/97-16050.pdf.

[144] *Bill Summary: Venezuela Temporary Protected Status Act of 2019,* NAT'L IMMIGR. F. (Mar. 08, 2019), https://immigrationforum.org/article/bill-summary-venezuela-temporary-protected-status-act-of-2019/.

[145] *Id.*

[146] *Id.*

economic, political, and humanitarian crises occurring within its borders.[147] Since 2014, nearly 72,000 Venezuelan nationals have come to the United States, seeking some sort of legal protection.[148] In 2018, nearly 30,000 foreign nationals from Venezuela applied for a form of legal immigration protection in the United States, making it the leading country for foreign nationals seeking asylum in the United States.[149] Nevertheless, the Trump Administration has been resistant to the idea of granting and accepting the proposed Venezuela TPS program, especially as it tries to terminate others.[150]

The judicial system has increasingly been stepping in to take action to save Temporary Protective Status holders and their legal status as the Trump Administration plans to cancel more and more programs or as the administration allows a program's deadline to linger. New programs have recently been introduced by members of Congress as chaos engulfs the world. Nevertheless, these new programs have been met by great resistance from the Executive Branch. The courts must continue to step in and save these programs, especially when a foreign national's legal immigration status, livelihood, and future is at stake. It is important, more than ever, that the courts as well recognize that when the government grants TPS to a foreign national, it is deemed as "admission" into the United States. Thus, admission will allow a beneficiary to go through the Adjustment of Status process. Adjustment of Status is an extra-protective process that gives an individual from another country lawful status in the United States.

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147 Venezuela Temporary Protected Status Act of 2019, S. 636, 116th Cong. §§ 2-3 (2019).

148 Camilo Montoya-Galvez, *TPS for Venezuelans: The Bipartisan Immigration Bill Lawmakers Believe Trump Might Support*, CBS NEWS (Jan. 18, 2019), https://www.cbsnews.com/news/tps-temporary-protected-status-for-venezuelans-in-us-bipartisan-immigration-bill-lawmakers-believe-trump-might-support/.

149 Charles Davis, *Trump Administration to Continue Deporting Venezuelans Despite Crisis*, THE GUARDIAN, https://www.theguardian.com/world/2019/jul/16/trump-administration-venezuelans-temporary-protected-status-tps-deport (last modified July 17, 2019, 07:45 EDT).

150 *Id.*

VI. TPS ADJUSTMENT OF STATUS CASES[151]

Currently, there are eight cases in which courts have resolved the issue of whether to grant a TPS visa holder the ability to go through the AOS process to obtain LPR status.

A. Circuit Court Cases

1. Ninth Circuit

The most recent Circuit Court case is *Ramirez v. Brown*,[152] a cause of action that appealed to the United States Court of Appeals for the Ninth Circuit.[153] In *Ramirez*, Jesus Ramirez entered the United States in May 1999 "without inspection and admission,"[154] nor was he paroled by an immigration officer.[155] In 2001, TPS was granted for El Salvadorians by then Attorney General John Ashcroft.[156] Mr. Ramirez then applied for TPS and subsequent extensions.[157] In 2012, Mr. Ramirez married a United States citizen, Ms. Barbara Lopez.[158] Ms. Lopez then subsequently filed an I-130 petition, "Petition for Alien Resident,"[159] for Mr. Ramirez.[160] Mr. Ramirez simultaneously filed an I-485 application[161] under 8 U.S.C. Section 1255[162] to become an LPR.[163] In April 2013, the USCIS approved Ms. Lopez's petition but denied Mr. Ramirez's application because he was not inspected and

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[151] At the time of publication submission, the cases discussed in Part VI were all the current cases litigated on the issue of whether a TPS recipient is eligible to go through the process as a whole because he or she may or may not be deemed lawfully admitted to the United States at the time the foreign national entered the United States without inspection.

[152] 852 F.3d 954 (9th Cir. 2017).

[153] *Id.*

[154] *See supra* note 18 for an explanation on "inspection and admission."

[155] *Ramirez,* 852 F.3d at 957.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] According to the USCIS, the I-130 calls for a foreign national to, "[u]se this form if you are a citizen or lawful permanent resident of the United States who needs to establish their relationship to certain alien relatives who wish to immigrate to the United States.;" *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/i-130 (last updated Feb. 27, 2020).

[160] *Ramirez,* 852 F.3d at 957.

[161] *See supra* text accompanying note 29.

[162] *See* 8 U.S.C. § 1255 (2009).

[163] *Ramirez,* 852 F.3d at 957.

admitted upon his initial entry into the United States in May 1999, nor could he show that he was exempt from the requirement.[164] The USCIS, in its denial, conceded that by granting TPS to Mr. Ramirez, he was to be treated by the government as if he was to have lawful nonimmigrant status. However, the government decided "that treatment does not override the adjustment statute's general requirement to be inspected and admitted or paroled."[165]

Upon his denial, Mr. Ramirez brought suit in the Western District of Washington under the Administrative Procedure Act ("APA").[166] The court ruled that Mr. Ramirez was able to adjust his status under 8 U.S.C. Section 1255.[167] The court determined that the government's interpretation was "incorrect as a matter of law because the TPS statute clearly provides that recipients count as being 'inspected and admitted' for purposes of adjusting their status."[168] Further, the court noted that it does not need to defer to the USCIS' interpretation, where the TPS statute unquestionably answers the legal question that was being proposed by Mr. Ramirez.[169] Also, according to the court, the USCIS' "non-precedential decisions" as well do not merit deference because the agency came to the wrong judgment, and it did not carefully analyze the legal question at issue.[170] Lastly, the court concluded that as a matter of "policy consideration," Mr. Ramirez established a life within the country and did not have to leave the United States to seek admission into it.[171]

The USCIS appealed the ruling to the Ninth Circuit.[172] The Ninth Circuit began its discussion by narrowing down the legal question to whether Mr. Ramirez had been "admitted" to the United States when the United States government granted him TPS.[173] To answer this question, the Ninth Circuit turned to a two-prong test as set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,*

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164 *Id.*
165 *Id.*
166 *Id.*; *see* 5 U.S.C. § 701 (2011).
167 *Ramirez,* 852 F.3d at 957-58.
168 *Id.* at 957.
169 *Id.*
170 *Id.*
171 *Id.* at 957.
172 *Id.* at 958.
173 *Id.*

Inc.[174] by the United States Supreme Court.[175] Under the first prong, the Ninth Circuit considered whether the TPS statute was unambiguous.[176] In its consideration of the first prong, the Ninth Circuit outright concluded that the statute unambiguously treats foreign nationals who have been granted TPS as "admitted," thus allowing aliens the ability to go through the adjustment of status process.[177] Additionally, the Ninth Circuit explained that the statutory language was clear; therefore, the USCIS has no "interpretative role" and must follow the congressional statutory mandate.[178] Furthermore, the Ninth Circuit did not analyze the second prong because it was unnecessary.[179] Nevertheless, the court noted that if it were to analyze the second prong because the statute was vague on what constitutes "admission," the USCIS did not identify which controlling interpretation the court should follow and give deference.[180]

Next, the Ninth Circuit turned to the plain language of the TPS statute. The Ninth Circuit held that the plain language of 8 U.S.C. Section 1254a(f)(4)[181] strongly provides and supports that a TPS holder is considered by the court (and therefore the government) to be "inspected and admitted" under 8 U.S.C. Section 1255(a).[182] Moreover, in its analysis, the court also addressed the structure of the statutory regime.[183] The Ninth Circuit stated:

> Other familiar interpretive guides reinforce the plain meaning understanding that TPS recipients are considered "admitted" under § 1255. Section 1255 is titled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence." The heading is not without significance, as it uses language that directly links the adjustment statute to the TPS

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[174] 467 U.S. 837. According to the *Chevron* two-prong test, when a court is reviewing an agency's interpretation of a statute, courts need to consider two questions: (1), "whether Congress has directly spoken to the precise question at issue." *Id.* at 842 (2) If not, "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

[175] *Ramirez,* 852 F.3d at 958.

[176] *Id.*

[177] *Id.*

[178] *Id.* (citing *Chevron*, 467 U.S. at 842-43).

[179] *Ramirez,* 852 F.3d at 958.

[180] *Id.* at 958-59.

[181] *See* 8 U.S.C. § 1254a(f)(4) (2018).

[182] *Ramirez,* 852 F.3d at 964.

[183] *Id.* at 961.

> statute and § 1254a(f)(4)'s phrasing of "lawful status as a nonimmigrant." This language and structure signal that Congress contemplated that TPS recipients, via their treatment as lawful nonimmigrants, would be able to make use of § 1255.[184]

Therefore, under 8 U.S.C. Section 1254a(f)(4) and 8 U.S.C. Section 1255, Mr. Ramirez and TPS recipients in the Ninth Circuit are able to go through the AOS process because he or she meets the 8 U.S.C. Section 1255(a)[185] "admission" requirements.[186]

2. Sixth Circuit

In *Flores v. USCIS*,[187] the Sixth Circuit also addressed granting or denying TPS holders the ability to go through the AOS process.[188] In March 1998, Saady Suazo, a citizen of Honduras, entered the United States without inspection and admission.[189] In September 1999, TPS was granted to citizens of Honduras by then Attorney General, Janet Reno.[190] Mr. Suazo applied for TPS, and the Attorney General granted it.[191] Subsequently, Ms. Suazo filed for successive extensions and was granted the continuations because of his good moral character.[192] In August 2010, Mr. Suazo married his wife, Mrs. Stacey Leigh Suazo, a United States citizen.[193] In September 2010, Mrs. Suazo filed an I-130 application, and Mr. Suazo filed an I-485 application on the same day pursuant to 8 U.S.C. Section 1255.[194] The Cleveland District Office of the USIS scheduled Mr. and Mrs. Suazo for an interview and review of the I-130 application on November 29, 2010.[195] The I-130 petition was approved by the USCIS, providing Mr. Suazo, "with an independent basis to become an LPR."[196] The following month, on

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184 *Id.*
185 *See* 8 U.S.C. § 1255(a) (2009).
186 *Ramirez,* 852 F.3d at 964.
187 718 F.3d 548 (6th Cir. 2013).
188 *Id.*
189 *Id.* at 550; *see supra* note 18 for an explanation of "inspection and admission."
190 *Flores*, 718 F.3d at 550.
191 *Id.*; *see supra* text accompanying note 49.
192 *Flores*, 718 F.3d at 550.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*

December 21, 2010, Mr. Suazo's I-485 application was denied because he had not entered the United States without inspection and admission.[197]

After the USCIS denied the AOS application, Mr. and Mrs. Suazo brought a suit against the USCIS in the Northern District of Ohio under the APA.[198] Mr. and Mrs. Suazo argued that the USCIS wrongfully denied the AOS petition and that "Mr. Suazo's TPS status under 8 U.S.C. § 1254a(b)(1)[199] makes him eligible to adjust to LPR status pursuant to 8 U.S.C. § 1255."[200] The USCIS, in response to the suit, filed a motion to dismiss on the grounds that the court lacked subject matter jurisdiction and that the couple failed to state a claim upon which relief can be granted.[201] The court held that it lacked jurisdiction to provide mandamus relief, but the Suazos had an adequate remedy under the APA.[202] Nonetheless, the court further held that Mr. and Mrs. Suazo failed to state a claim under the APA.[203] The District Court reasoned that the plain language of 8 U.S.C. Section 1255 precludes a TPS holder, who is not initially admitted and inspected, from going through the AOS process.[204]

The Suazos appealed the District Court's ruling to the Sixth Circuit.[205] Upon appeal, the Sixth Circuit agreed to review the Suazos' APA claim and to consider the question, "whether 8 U.S.C. § 1254a(f)(4) of the TPS statute provides a path to LPR status under the adjustment of status statute, 8 U.S.C. § 1255."[206] The Sixth Circuit began its discussion by looking to the *Chevron*[207] two-prong test on an agency's interpretation.[208] Further, the Sixth Circuit elaborated that "in determining if the intent is clear, courts consider 'the language [of the statute] itself, the specific context in which that language is used,

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197 *Id.*

198 *Id.*

199 *See* 8 U.S.C. § 1254a(b)(1) (2018).

200 *Flores*, 718 F.3d at 550. The court does not elaborate why Mr. Suazo was eligible at this point in its opinion.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at 550-51.

205 *Id.* at 551.

206 *Id.*

207 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

208 *Flores*, 718 F.3d at 551; *see Chevron*, 467 U.S. at 842-43.

and the broader context of the statute as a whole.'"[209] Also "[i]f the statute is found to be silent or ambiguous, and there is an agency interpretation that does not constitute the exercise of the agency's formal rule-making authority, courts may defer to an agency interpretation, even when the agency is not exercising its formal rule-making authority."[210] Additionally, the gravity of the deference that the court gives, if it gives deference, "depends on, 'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"[211]

After applying the various deference tests, the Sixth Circuit concluded that under the plain language of 8 U.S.C. Section 1255, Mr. Suazo satisfied two of the three requirements for a nonimmigrant who holds lawful TPS status to adjust their status.[212] The first requirement of the statute that Mr. Suazo met was that he applied for AOS.[213] The second requirement of the statute was that an immigrant visa is immediately available, which it was through Mrs. Suazo, a United States citizen.[214] The requirement under contestation was the third prong, "which reads 'the status of an alien who was inspected and admitted or paroled' may be adjusted in the Attorney General's discretion and also § 1255(a)(2), which states that an 'alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.'"[215]

The USCIS contested that Mr. Suazo did not meet the third requirement of 8 U.S.C. Section 1255 because TPS beneficiaries who initially enter the United States without inspection and who have an

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[209] *Flores*, 718 F.3d at 551 (quoting Nat'l Cotton Council of Am. v.. U.S. EPA, 553 F.3d 927, 933 (6th Cir. 2009)).

[210] *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

[211] *Id.* (quoting *Skidmore*, 323 U.S. at 140).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* (citing 8 U.S.C. § 1255(a) (2009)). The Sixth Circuit also said in a footnote that:

> We recognize that using the term "'alien" to refer to other human beings is offensive and demeaning. We do not condone the use of the term and urge Congress to eliminate it from the U.S. Code. We use it here, however, to be consistent with the statutory language and to avoid any confusion in replacing a legal term of art with a more appropriate term.

Id. at 551 n.1.

independent basis for a visa, can never meet nor satisfy the threshold requirement of being "admitted or paroled" or "admissible."[216] Furthermore, the USCIS argued that Mr. Suazo is only allowed protection under TPS as long as that designation is conferred upon him by the government.[217] Moreover, the USCIS argued that Mr. Suazo was not able to adjust via his wife on an independent basis because he was never "admitted."[218] Therefore, to become classified as "admitted," Mr. Suazo would have to leave the United States, take a chance at potentially not being "admitted" into the country, reapply to become an LPR, and then hope he would be able to a green cardholder.[219]

The Suazos countered the USCIS' argument and contended that "the plain language, when considering the 'language itself, the specific context in which the language is used, and the broader context of the statute as a whole,' shows that Congress's clear intent was that a TPS beneficiary is afforded with a pathway to LPR status."[220] Additionally, the Suazos conceded that a foreign national must be "admitted" or "admissible."[221] Nevertheless, the couple argued that when the government grants TPS to a beneficiary, a TPS grant acts as an inadmissibility waiver.[222] The Sixth Circuit wholeheartedly agreed with this line of reasoning and were unpersuaded by the USCIS' arguments and interpretations of the statute.[223] The court expanded on the fact that the USCIS' interpretations ignored the plain meaning of the statute and were "unduly narrow."[224]

Furthermore, the Sixth Circuit amplified the fact that the statutory scheme and plain language of the TPS statute adamantly supported the court's ruling.[225] Therefore, since the court based its holding on the plain language of the statute, the Sixth Circuit did not need to give deference to the USCIS' interpretation of the statute.[226] Nonetheless, the Sixth Circuit addressed the fact that if the weight of

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216 *Id.* at 552.
217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.*
224 *Id.* at 553.
225 *Id.* at 553-54.
226 *Id.* at 554-55 (citing Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989)).

the deference was to be entertained by the court as set for by the standards established in *Skidmore*,[227] a lower deference standard that an agency needs to meet.[228] The court explained:

> [T]he 'validity of reasoning' factor weighs heavily against the USCIS and outweighs the consistency factor. Being consistently wrong does not afford the agency more deference than having valid reasoning. The remaining factor—the thoroughness of the reasoning—does not militate strongly for either side. Again, incorrect reasoning, no matter how thorough, does not carry any weight. Any deference afforded would have been minimal, if at all.[229]

Therefore, the Sixth Circuit overturned the District Court's decision and held that, under the plain language of the statute, Congress intended that a TPS hold can go through AOS.[230]

3. Eleventh Circuit

In *Serrano v. United States Attorney General*,[231] the Eleventh Circuit took a different approach.[232] In *Serrano*, Jose Garcia Serrano, a citizen of El Salvador, entered the United States in 1996 without inspection and admission or being paroled.[233] Mr. Serrano applied for TPS in 2001 when El Salvador was designated based on claims that this home country was an unfit place to live.[234] Mr. Serrano subsequently filed for extensions in 2006, 2008, and 2009.[235] In 2006, Mr. Serrano married Ms. Olga Garcia, a United States citizen.[236] In 2008, Ms. Garcia filed an I-130 petition for Mr. Serrano.[237] Additionally, Mr. Serrano filed his I-485 application concurrently with the I-130 petition so that he may become an LPR.[238] Upon review of

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227 Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).
228 *Flores*, 718 F.3d at 555.
229 *Id*.
230 *Id.* at 555-56.
231 655 F.3d 1260 (11th Cir. 2011).
232 *Id.* at 1263.
233 *Id*.; *see supra* note 18 for an explanation of "inspection and admission."
234 *Serrano*, 655 F.3d at 1263.
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.*

the I-485, the USCIS denied the AOS petition.[239] The USCIS rejected the application on the grounds that Mr. Serrano did not enter the United States with inspection nor the admittance by an immigration officer.[240] Thus, making him ineligible under 8 U.S.C. Section 1255(a).[241]

Mr. Serrano challenged the USCIS' ruling and filed suit in the Northern District of Georgia.[242] Mr. Serrano contended that 8 U.S.C. Section 1254a(f)(4) changes the admission requirements as established by 8 U.S.C. Section 1255(a).[243] He further argued that since the requirements for admission into the United States under 8 U.S.C. Section 1255(a) were altered, as a TPS holder, he was entitled to adjust his status as a valid TPS holder.[244] The court held that the plain language of 8 U.S.C. Section 1254a(f)(4) did not jibe with the requirements of 8 U.S.C. Section 1255 because Mr. Serrano was not inspected and admitted or paroled.[245] Additionally, the District Court elaborated on its holding that 8 U.S.C. Section 1255(a) was ambiguous.[246] The USCIS' interpretation was entitled to the *Skidmore*[247] deference rule.[248]

Upon the court's adverse ruling, Mr. Serrano appealed to the Eleventh Circuit.[249] Upon review, the Eleventh Circuit turned to the APA claim and the USCIS' statutory interpretation.[250] In assessing the interpretation of the statute by the USCIS, the Eleventh Circuit turned to *Chevron*[251] and its first prong.[252] The Eleventh Circuit also stated, in addition to the first prong in *Chevron*, that "[t]he first step of statutory construction is to determine whether the language of the statute, when considered in context, is plain. The court further elaborated that if the meaning of the statutory language in context is

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239 *Id.*
240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).
248 *Serrano*, 655 F.3d at 1263.
249 *Id.*
250 *Id.*
251 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).
252 *Serrano*, 655 F.3d at 1264.

plain, we go no further."[253] After reviewing the statutes, the court decided in favor of the USCIS and disagreed with Mr. Serrano that the plain language of 8 U.S.C. Section 1254a(f)(4)[254] alters the "inspected and admitted or paroled"[255] provision to adjust one's status.[256]

In interpreting the plain language of the statute, the Eleventh Circuit found that the statute limits the eligibility for adjustment of status.[257] The court stated "[t]hat an alien with Temporary Protected Status has 'lawful status as a nonimmigrant' for purposes of adjusting his status does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted or paroled."[258]

Moreover, the Eleventh Circuit addressed Mr. Serrano's contention that the statutory language was ambiguous.[259] The court concluded that Mr. Serrano's argument does not hold water because the USCIS' predecessor, the Immigration and Naturalization Service ("INS"), interpreted the statutes the same way the court did.[260] The Eleventh Circuit ultimately concluded that the USCIS is entitled to the deference that is provided by *Skidmore*,[261] even if the statutory language is ambiguous, because the government's interpretation was "consistent and well-reasoned."[262] Therefore, the Eleventh Circuit does not grant a TPS holder the right to go through the AOS process.[263]

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[253] *Id.* (quoting Wachovia Bank, N.A. v. United States, 455 F.3d 1261, 1267 (11th Cir. 2006)).

[254] *See supra* note 181 for statute citation.

[255] *See supra* text accompany note 18 and note 21.

[256] *Serrano*, 655 F.3d at 1264-65.

[257] *Id.* at 1265.

[258] *Id.*

[259] *Id.*

[260] *Id.* at 1264-65.

[261] The Eleventh Circuit in using the *Skidmore* deference rule was citing to Quinchia v. U.S. Att'y Gen., 552 F.3d 1255, 1259 (11th Cir. 2008). The Eleventh Circuit in *Quinchia* paraphrased *Skidmore* and stated that, "a non-binding administrative interpretation carries a weight dependent upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

[262] *Serrano*, 655 F.3d at 1266.

[263] *Id.*

B. District Court Suits

In addition to the circuits taking up the adjustment of the status issue for TPS holders, various district courts (without an appeal to their respective circuit courts, except one) addressed and ruled on the issue.

1. Eastern District of Pennsylvania

In *Medina v. Beers*,[264] the Eastern District of Pennsylvania heard and ruled on the controversy.[265] In *Medina*, Melvin Medina, a citizen of Honduras, came to the United States and entered without inspection in October 1992.[266] Mr. Medina received TPS soon after the Attorney General designated it for Honduras in 1999.[267] In January 2002, Mr. Medina married Catherine Medina, a United States Citizen, and the couple subsequently had three children together.[268] In December 2012, Mrs. Medina filed an I-130[269] petition for her husband, and Mr. Medina concurrently filed an I-485[270] application to adjust his status to become an LPR.[271]

After receiving Mr. Medina's AOS petition, the USCIS made several Request For Evidence[272] ("RFE") attempts to address Mr. Medina's eligibility to become an LPR.[273] Mr. Medina responded to all RFEs.[274] The USCIS scheduled an interview for Mr. Medina in May of 2012 for an interview to provide a sworn declaration in relation to his application.[275] After the interview and no action by the USCIS for about five months on the pending petitions, Mr. Medina went to local the USCIS field office in Philadelphia to explore the status of his requests.[276] Soon after visiting the USCIS field office, in October

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264 65 F. Supp. 3d 419 (E.D. Pa. 2014).

265 *Id.* at 438-39.

266 *Id.* at 421.; *see supra* note 18 for an explanation of "inspection and admission."

267 *Medina*, 65 F. Supp. 3d at 421*; see supra* text accompanying note 49.

268 *Medina*, 65 F. Supp. 3d at 421.

269 *See supra* text accompanying note 29.

270 *See supra* text accompanying note 159.

271 *Medina*, 65 F. Supp. 3d at 421.

272 A "Request For Evidence" is just as it implies. It is the government requesting an individual or corporation to submit more information/evidence to help establish his or her or its case.

273 *Medina*, 65 F. Supp. 3d at 421.

274 *Id.*

275 *Id.*

276 *Id.*

2012, the USCIS issued a Notice of Intent to Deny[277] ("hereinafter NOID") of Mr. Medina's AOS application under 8 U.S.C. Section 1255(a)[278] of the TPS statute.[279] The USCIS, in its NOID letter, as well stated:

> Therefore, you appear to be statutorily ineligible for adjustment of status under Section 245(a)[280] because you entered without inspection. In addition, you appear to be ineligible to adjust your status under the provisions of Section 245(i)[281] of the Act because no proof of physical presence on December 21, 2000, was provided and no petition appears to be filed on your behalf on or prior to April 30, 2001.[282]

In November 2012, Mr. Medina responded to the USCIS' NOID letter.[283] Mr. Medina argued that the plain language of the statute authorized "his classification as an individual in and maintaining lawful status as a nonimmigrant, and thus eligible for adjustment of status."[284] Mr. Medina expressly relied upon 8 U.S.C. Section 1254a(f)(4)[285] as the basis of his argument.[286]

In May 2013, the USCIS issued its final response to deny Mr. Medina's AOS petition.[287] In its final decision, the USCIS reiterated the reasons why it denied Mr. Medina's application.[288] The USCIS as well claimed that since Mr. Medina failed to respond to the NOID, his

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[277] According to the USCIS, in describing what is a Notice of Intent to Deny, states "[y]ou will receive a Notice of Intent to Deny if you are currently in valid status and found ineligible for asylum. You will have 16 days to provide a response to the letter. The Asylum Officer will then either approve or deny the claim." *Asylum Decisions: What is a Notice of Intent to Deny?*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/faq-page/asylum-decisions#t12836n40055 (last visited Feb. 17, 2020). The USCIS on its website is very vague on what actually is a Notice of Intent to Deny. A Notice of Intent to Deny is exactly as the name implies: the USCIS is submitting to a foreign national that is has the intent to deny a petition.

[278] *See supra* note 185 for statute citation.

[279] *Medina*, 65 F. Supp. 3d at 422.

[280] Section 245(a) correlates to 8 U.S.C. § 1255(a).

[281] Section 245(i) correlates to 8 U.S.C. § 1255(i).

[282] *Medina*, 65 F. Supp. 3d at 422.

[283] *Id.*

[284] *Id.*

[285] *See supra* note 181 for statute citation.

[286] *Medina*, 65 F. Supp. 3d at 422.

[287] *Id.*

[288] *Id.*

application was abandoned, and it was denied.[289] The following month, in June 2013, Mr. Medina sent a follow-up letter to the USCIS, arguing that he did not abandon his application because he had responded to the NOID.[290] Additionally, Mr. Medina, in his response, added a copy of *Flores v. USCIS*,[291] the Sixth Circuit decision on the matter.[292] The USCIS never responded to Mr. Medina.[293] In February 2014, Mr. Medina began civil proceedings against the government.[294]

Subsequently, as Mr. Medina initiated the cause of action, the USCIS reopened its May 2013 verdict and instead issued a new decision superseding its previous one.[295] In its new decision, the USCIS commented that it issued the NOID in error.[296] Moreover, the USCIS errored by not logging its response into the file.[297] Despite that, the USCIS still denied the application because of the decisions made in *Matter of Sosa Ventura*[298] by the Board Of Immigration Appeals ("BIA") and *Serrano v. United States Attorney General*[299] out of the Eleventh Circuit.[300]

The District Court decisions discussed, elaborated, and explained the *Chevron* deference rule, its two-prong test, and its application to the Executive Branch.[301] In its opinion, the District Court acknowledged that there was a stipulation by both parties on the sole issue of whether granting TPS meets the requirements of admission to adjust one's status under 8 U.S.C. Section 1255(a).[302] The court declared that the government satisfied the "inspected and admitted or paroled"[303] requirements under 8 U.S.C. Section 1255(a)

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289 *Id.*

290 *Id.*

291 Flores v. USCIS, 718 F.3d 548 (6th Cir. 2013).

292 *Medina*, 65 F. Supp. 3d at 422.

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.* at 422-23

297 *Id.*

298 25 I&N Dec. 391 (BIA 2010). The BIA in this case held that granting TPS "waives certain grounds of inadmissibility or deportability solely for the limited purpose of permitting an alien to remain and work temporarily in the United States for the period of time that TPS is effective." *Id.* Also, the BIA ruled that "[i]t is not proper to terminate an alien's removal proceedings based on a grant of TPS." *Id.*

299 Serrano v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011).

300 *Medina*, 65 F. Supp. 3d at 423.

301 *Id.* at 424-25.

302 *Id.*

303 *See supra* text accompany note 18 and note 21.

by administering TPS to foreign nationals under 8 U.S.C. Section 1254a(f)(1).[304] In considering at 8 U.S.C. Section 1255(a), the District Court stated that for a foreign national to go through the AOS process, a foreign national must show "that he or she was 'inspected and admitted or paroled into the United States.'"[305] Furthermore, the court elaborated that a foreign national "must (1) have made an application for an adjustment; (2) be eligible to receive an immigrant visa and be admissible to the United States for permanent residence; and (3) have an immigrant visa immediately available to him at the time his application is filed."[306] Next, there was a stipulation by both parties that Mr. Medina met the three latter requirements, but whether Mr. Medina satisfied the overall threshold requirement of being "inspected and admitted or paroled into the United States."[307]

Mr. Medina proclaimed that he satisfied the threshold requirement because of 8 U.S.C. Section 1254a(f)(4), which states, in part, that "[d]uring a period in which an alien is granted temporary protected status under this section . . . for purposes of adjustment of status under section 1255 of this title . . . the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant."[308] Moreover, Mr. Medina "contends that, given Section 1254's direct reference to Section 1255, the term 'considered as being in, and maintaining, lawful status as a nonimmigrant' equates to being 'inspected and admitted or paroled in the United States.'"[309] On the other hand, the government implored the District Court to take an adversarial interpretation of Mr. Medina's understanding of 8 U.S.C. Section 1254a(f)(4) and 8 U.S.C. Section 1255(a).[310] The USCIS argued that the threshold requirement could not be fulfilled by the granting of TPS and nothing in 8 U.S.C. Section 1254a(f)(4) indicates the qualifications needed for AOS under 8 U.S.C. Section 1255(a).[311] Also, the USCIS contended that both provisions Mr. Medina was citing to contain different terms, which suggested that Congress was talking about two separate things.[312] Therefore, according to the government,

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304 *Medina*, 65 F. Supp. 3d at 425.
305 *Id.* at 426 (quoting 8 U.S.C. § 1255(a) (2009)).
306 *Id.* (citing 8 U.S.C. § 1255(a)).
307 *Id.* (quoting 8 U.S.C. § 1255(a)).
308 *Id.* (quoting 8 U.S.C. § 1254a(f)(4) (2018)).
309 *Id.* (quoting 8 U.S.C. § 1254a(f)(4) and 8 U.S.C. § 1255(a)).
310 *Medina*, 65 F. Supp. 3d at 426.
311 *Id.*
312 *Id.*

the plain language under 8 U.S.C. Section 1254a(f)(4) provided no path to Mr. Medina to adjust his status.[313]

Following the discussion of the government's arguments, the District Court analyzed a couple of cases that had already decided on the issue at hand. The court went on to address the cases of *Serrano v. United States Attorney General*[314] out of the Eleventh Circuit and *Flores v. USCIS*[315] from the Sixth Circuit.[316] Ultimately, the District Court sided with Sixth Circuit's rationale and declared that "a TPS beneficiary who applies for adjustment of status, is eligible for an immigrant visa, and has an immigrant visa immediately available to him qualifies for the discretionary adjustment of status under § 1255(a)." After reiterating its holding, the court discussed the contentions made by the USCIS and affirmed its reasoning that the government's arguments were unconvincing.[317] Additionally, the District Court addressed the deference that is supposed to be granted to executive agencies' interpretations when a statute's language is ambiguous.[318] The court found that Congress' intent was clear in its plain language under 8 U.S.C. Section 1254a(f)(4) and the court should not give deference to the USCIS' interpretation.[319]

In its final conclusions, the District Court found the USCIS' decision to deny Mr. Medina's application for AOS was "arbitrary and capricious," and the determination is reversed and remanded to the USCIS for further consideration.[320]

2. District of Minnesota

In another district court case, *Bonilla v. Johnson*,[321] the District of Minnesota heard and ruled on the controversy.[322] In *Bonilla*, Lidia Bonilla, a citizen of El Salvador, entered the United States without inspection.[323] In January 2006, while her asylum claim was pending

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313 *Id.*

314 Serrano v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011).

315 Flores v. USCIS, 718 F.3d 548 (6th Cir. 2013).

316 *Medina*, 65 F. Supp. 3d at 426-28.

317 *Id.* at 429-36.

318 *Id.* at 436.

319 *Id.* at 436-37.

320 *Id.* at 437.

321 149 F. Supp. 3d 1135 (D. Minn. 2016).

322 *Id.* at 1136.

323 *Id.*; *see supra* note 18 for an explanation of "inspection and admission."

with the government, Ms. Bonilla timely applied for TPS.[324] Finding no basis to deny Ms. Bonilla her petition, USCIS granted her TPS in 2007.[325] Since being granted TPS in 2007, Ms. Bonilla had continuously filed applications for extensions of her TPS.[326] In February 2014, Nelly Anderson, a United States citizen over the age of twenty-one[327] and the daughter of Ms. Bonilla, filed an I-130[328] petition for her mother.[329] On the same day, Ms. Bonilla concurrently filed an I-485[330] to adjust her status under 8 U.S.C. Section 1255[331] to become an LPR. [332]

In March 2014, the USCIS issued an RFE.[333] The USCIS was trying to ascertain Ms. Bonilla's "eligibility for adjustment of status, including 'evidence of [her] lawful admission or parole into the United States.'"[334] In response to the USCIS' RFE, Ms. Bonilla submitted copies of her TPS approval notice(s) (including the extensions).[335] Ms. Bonilla asserted that the government granting TPS constituted admission into the United States, thus making her eligible for the AOS process.[336] In July 2014, the USCIS sent a second RFE asking again for evidence that she was inspected, admitted, or paroled.[337] Ms. Bonilla, in response to the second RFE, submitted her TPS approval notices and a brief letter again.[338] In October 2014, the USCIS approved Ms. Anderson's I-130 petition but denied Ms. Bonilla's I-

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[324] *Bonilla*, 149 F. Supp. 3d at 1136.

[325] *Id.*

[326] *Id.*

[327] *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., INSTRUCTIONS FOR FORM I-130, PETITION FOR ALIEN RELATIVE, AND FORM I-130A, SUPPLEMENTAL INFORMATION FOR SPOUSE BENEFICIARY (last updated Feb. 13, 2019). For a child of an alien to file an I-130 petition, that child must meet certain requirements, for example, the child must be a United States citizen and be twenty-one years of age or older.

[328] *See supra* text accompanying note 159.

[329] *Bonilla*, 149 F. Supp. 3d at 1136.

[330] *See supra* text accompanying note 29.

[331] *See supra* note 57 for statute citation.

[332] *Bonilla*, 149 F. Supp. 3d at 1136.

[333] *Id.*

[334] *Id.* (alteration in original).

[335] *Id.*

[336] *Id.*

[337] *Id.*

[338] *Id.*

485 application.[339] The USCIS based its denial on Ms. Bonilla's failure to submit "lawful admission or parole into the United States."[340]

Soon after the denial by the USCIS, Ms. Bonilla filed suit under the APA.[341] The District of Minnesota began its discussion by discussing on *Chevron*[342] and its two-prong test.[343] After the District Court's discussion of *Chevron*, the court pivoted to the question at issue:

> The issue before the Court is one of statutory interpretation. And the threshold question under *Chevron* is whether the plain language of 8 U.S.C. § 1254a(f)(4) (a TPS benefits section), read in context, makes clear that when a person is granted TPS under 8 U.S.C. § 1254a,[344] it satisfies the threshold requirement of inspection and admission to the United States under 8 U.S.C. § 1255(a) for purposes of becoming eligible for adjustment to LPR status.[345]

In answering the question presented, the District Court went into detail of what each cited statutes entails.[346] After expanding upon what the statutes encompassed, the District Court stated:

> [T]he plain language of the statute as written resolves the question before the Court. 8 U.S.C. § 1254a(f)(4) applies to the entirety of § 1255, allows Plaintiff to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status under § 1255, and therefore satisfies the "inspected and admitted or paroled" prerequisite of § 1255. And because the statute is clear and unambiguous—not silent or ambiguous—the Court need not consider the agency's interpretation under step two of the *Chevron* deference analysis.[347]

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339 *Id.*

340 *Id.*

341 *Id.* at 1137.

342 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

343 *Bonilla*, 149 F. Supp. 3d at 1137.

344 *See supra* text accompanying note 49.

345 *Bonilla*, 149 F. Supp. 3d at 1137.

346 *Id.* at 1137-38.

347 *Id.* at 1138-39.

In its holding, the District Court addressed those arguments upon which the USCIS used as its basis for the case.[348] In its defense, the USCIS relied on *Roberts v. Holder*,[349] an Eighth Circuit case as precedent.[350] The USCIS contested that the Eighth Circuit "only" authorized one way that the government may admit a foreign national into the country post-entry, which was through AOS, not through the granting of TPS.[351] The District Court rejected this argument outright because the *Roberts* case addressed a completely different question; the question, in that case, was whether an individual who had already gone through the AOS process before being convicted of multiple crimes was eligible for an 8 U.S.C. Section 1182(h)[352] waiver.[353] Additionally, as the District Court noted, the *Roberts* case "cuts against" government's argument.[354] The court said, "'[s]ection 1255(b)[355] treats *adjustment* itself as an 'admission' by directing the Attorney General to record 'admission' as the date the alien adjusts his status,' therefore indicating that 'admission' is not always limited to only port-of-entry admissions.'"[356]

The USCIS, in its defense, relied on the Eleventh Circuit holding in *Serrano v. United States Attorney General*[357] and asked the District Court to follow and accept that ruling.[358] The District Court, however, tenaciously disagreed with that ruling and decided in favor of the holdings in *Flores*,[359] *Medina*,[360] and *Ramirez*,[361] because *Serrano* was distinguishable on its facts.[362] The District Court noted that in *Serrano*, the plaintiff failed to candidly disclose to the

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348 *Id.* at 1139.

349 745 F.3d 928 (8th Cir. 2014).

350 *Bonilla*, 149 F. Supp. 3d at 1139.

351 *Id.*

352 *See* 8 U.S.C. § 1182(h) (2013). Granting of waivers by the Secretary of Homeland Security is found in this part of the INA and under certain subsections.

353 *Bonilla*, 149 F. Supp. 3d at 1139 (citing *Roberts*, 745 F.3d at 932).

354 *Id.*

355 *See* 8 U.S.C. § 1255(b) (2009).

356 *Bonilla*, 149 F. Supp. 3d at 1139 (quoting *Roberts*, 745 F.3d at 933).

357 Serrano v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011).

358 *Bonilla*, 149 F. Supp. 3d at 1141.

359 Flores v. USCIS, 718 F.3d 548 (6th Cir. 2013).

360 Medina v. Beers, 65 F. Supp. 3d 419 (E.D. Pa. 2014).

361 At the time *Bonilla* was argued, the Ninth Circuit case, Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017), was only a recently decided District Court case in the Western District of Washington; *see* Ramirez v. Dougherty, 23 F. Supp. 3d. 1322, 1327 (W.D. Wash. 2014).

362 *Bonilla*, 149 F. Supp. 3d at 1141.

government that he originally entered the United States illegally without inspection.[363] The District Court ultimately held that on this point that the Eleventh Circuit's "interpretation too narrow and inconsistent with the plain language of the statute."[364] Furthermore, the court found that the government's arguments to compare language across the various statutes and rely upon the USCIS interpretation goes against the plain language of 8 U.S.C. Section 1254a(f)(4).[365]

Moreover, the District Court found that the interpretation of the USCIS would be absurd and quotes *Medina* for its eloquence to the applicable situation:

> To interpret the statutes in the manner suggested by Defendants, the Court would have to find that, despite allowing TPS beneficiaries to remain and work in this country in excess of fifteen years, Congress intended that such beneficiaries could never become lawful permanent residents without physically leaving this country, abandoning families that they have created during their extended stay, quitting their employment that they have been allowed to maintain, and returning to a country that the Attorney General has expressly deemed unsafe, simply in order to undergo the immigration process all over again. In addition, these individuals would have to surrender any entitlement to TPS because, by leaving the country, they would fail to maintain "continuous physical presence" as required by the TPS extension. . . . To force [plaintiff] to return to a country that the United States Attorney General has deemed dangerous simply to have [p]laintiff physically reenter the United States is a result that appears to serve no practical purpose.[366]

The court as well went on to quote *Flores* in depth.[367] The District Court also declared that Ms. Bonilla was eligible to adjust her status

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[363] *Id.*

[364] *Id.* at 1141-42.

[365] *Id.* at 1142.

[366] *Id.* (quoting Medina v. Beers, 65 F. Supp. 3d 419, 435-36 (E.D. Pa. 2014)) (alterations in original).

[367] *Bonilla*, 149 F. Supp. 3d at 1142-43.

through her daughter, and it would be ludicrous for Ms. Bonilla to return to El Salvador before she could go through the AOS process.[368]

In summary, the court concluded that the plain language of 8 U.S.C. Section 1254a(f)(4) and 8 U.S.C. Section 1255(a) provided TPS holders the eligibility to go through AOS and the government's interpretation 8 U.S.C. Section 1254a(f)(4) and 8 U.S.C. Section 1255(a) was "arbitrary and capricious."[369] Additionally, recipients of TPS satisfied the threshold question[370] under 8 U.S.C. Section 1255(a).[371] Therefore, the District Court reversed the decision of the USCIS and remanded it back to the agency for further consideration.[372]

In the District of Minnesota, *Leymis V. v. Whitaker*[373] was decided in November 2018 on the same merits and nearly identical facts as *Bonilla*.[374] The District of Minnesota, again, ruled in favor of TPS recipients.[375] The District Court held holders of TPS are eligible to go through AOS because recipients satisfied the standards and requirements 8 U.S.C. Section 1254a(f)(4) and 8 U.S.C. Section 1255(a).[376] Also, recipients of TPS—yet again—satisfied the threshold question under 8 U.S.C. Section 1255(a) of being "inspected and admitted"[377] into the United States."[378] In *Melgar v. Barr*,[379] the District of Minnesota in April 2019—yet again—had the sole issue of "whether TPS beneficiaries are deemed "inspected and admitted" to satisfy the threshold requirement for adjustment of status to LPR."[380] The District Court held that:

> [T]he plain language of 8 U.S.C. § 1254a(f)(4), read in context, makes clear that when a person is granted TPS under 8 U.S.C. § 1254a, it satisfies the threshold requirement of inspection and admission to the United

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368 *Id.* at 1143.
369 *Id.*
370 *See supra* note 345.
371 *Bonilla*, 149 F. Supp. 3d at 1143.
372 *Id.*
373 355 F. Supp. 3d 779 (D. Minn. 2018).
374 *Id.* at 781.
375 *Id.* at 784-85.
376 *Id.*
377 *See supra* note 18 for an explanation of "inspection and admission."
378 *Leymis V.*, 355 F. Supp. 3d at 784-85.
379 379 F. Supp. 3d 783 (D. M*i*nn. 2019).
380 *Id.* at 784-85.

> States under 8 U.S.C. § 1255(a) for the purposes of becoming eligible for adjustment to LPR status.[381]

The government is currently appealing the case to the Eighth Circuit.[382] On June 20, 2019, the Eighth Circuit consolidated *Melgar* and *Leymis V.* into one case on appeal.[383] Depending on how the Eighth Circuit rules, it could be an additional form of relief for TPS recipients, or it may spell disaster for all TPS holders within the Eighth Circuit who seek to adjust his or her status.

3. District of New Jersey

Most recently, in *Santos Sanchez v. Johnson*,[384] the District of New Jersey addressed the issue of whether a TPS holder can go through the AOS process.[385] Mr. Jose Santos Sanchez and Mrs. Sonia Gonzalez, a married couple and citizens of El Salvador, entered the United States, respectively, in 1997 and 1998, without inspection.[386] In 2001, both Mr. Sanchez Santos and Mrs. Gonzalez applied for TPS, received the protected status, and subsequently applied for extensions.[387] In June 2014, Mr. Sanchez Santos and Mrs. Gonzalez submitted an I-485 application to go through AOS and change their status to LPR.[388] In March 2015, the USCIS denied the petition.[389] After the USCIS issued the denial, Mr. Sanchez Santos and Mrs. Gonzalez filed a cause of action seeking a determination on their eligibility status to go through AOS under the Immigration and Nationality Act ("INA").[390] In November 2016, the USCIS reopened Mr. Sanchez Santos and Mrs. Gonzalez case and issued a NOID.[391] The NOID declared that Mr. Sanchez Santos and Mrs. Gonzalez were

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381 *Id.* at 787.

382 Melgar v. Barr, 379 F. Supp. 3d 783 (D. Minn. 2019), *appealed sub. nom.*, Melgar v. Barr, No. 19-2310 (8th Cir. June 03, 2019).

383 Order Consolidating Case Melgar v. Barr and Case Leymis V. v. Whitaker, Melgar, V. Barr, 19-2130 (8th Cir. June 20, 2019).

384 No. 16-651-RBK, 2018 WL 6427894, at *1 (D.N.J. Dec. 07, 2018).

385 *Id.*

386 *Id.*; *see supra* note 18 for an explanation of "inspection and admission."

387 *Santos Sanchez*, 2018 WL 6427894, at *1.

388 *Id.*

389 *Id.*

390 *Id.* at *1-2.

391 *Id.* at *1.

not eligible under 8 U.S.C. Section 1254a(f)(4) and 8 U.S.C. Section 1255(a) to go through the AOS process.[392]

In February 2017, the USCIS officially denied the I-485 application.[393] In its denial letter, the USCIS highlighted that Mr. Sanchez Santos was not "inspected and admitted or paroled into the United States" because he was working without authorization that exceeded 180 days, making him, therefore, ineligible under 8 U.S.C. Section 1255(a).[394] Also, the USCIS denied Mrs. Gonzalez's because she was dependent on Mr. Santos Sanchez's approval.[395] The USCIS, however, did recognize Mr. Santos Sanchez's past entry into the United States via being paroled;[396] nonetheless, the executive agency decided that neither Mr. Santos Sanchez's parole nor his TPS was a proper admission into the United States to overcome the bar to adjust one's status under 8 U.S.C. Section 1255(c)[397] for working without authorization.[398] Both parties moved for Summary Judgment on the issues under the INA and APA.[399]

In beginning its analysis, the District Court set out the standards reviewing an executive agency's decision.[400] In discussing the scope of judicial review of the agency's decision, the court nearly mirrored the language used in *Medina*, and, like *Medina,* the *Santos Sanchez* court highlighted the *Chevron*[401] deference two-prong test.[402] After setting out the various standards, the District Court pivoted the stipulated issue of the case, "this matter is one of statutory interpretation: whether the grant of Temporary Protected Status under 8 U.S.C. § 1254a satisfies the threshold requirement of being 'inspected and admitted or paroled into the United States' for purposes of adjustment of status under 8 U.S.C. § 1255(a)."[403] Next, the court addressed the relevant statutes in detail, and then it moved to its main

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392 *Id.*

393 *Id.*

394 *Id.*

395 *Id.*

396 *See supra* text accompanying note 21.

397 *See supra* note 35 for statute citation.

398 *Santos Sanchez*, 2018 WL 6427894, at *1.

399 *Id.* at *2.

400 *Id.* at *2-3.

401 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

402 *Santos Sanchez*, 2018 WL 6427894, at *2-3.

403 *Id.* at *3.

discussion.[404] In the District Court's main discussion, it provided an answer to the legal question.[405] The court wrote that the statute was "clear and unambiguous," and that:

> Section 1254a(f)(4) applies to the entirety of § 1255. Again, section 1254a(f)(4) states, "for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien *shall be considered as being in, and maintaining, lawful status as a nonimmigrant.*" This lawful status is wholly consistent with being considered as though Plaintiffs had been "inspected and admitted" under § 1255.[406]

After answering the question in contestation, the District Court moved to the applicable case.[407]

The court in assessing the applicable case law looked to *Flores*, *Medina*,[408] *Ramirez*,[409] and *Bonilla*.[410] The District Court cited the latter cases because it supported its position.[411] The court then shifted to the government's argument that *Serrano* applied in the case.[412] The government argued that the District Court should adopt a narrow interpretation of the statute.[413]

Nevertheless, the court rejected the reading of the Eleventh Circuit.[414] The District Court said that *Serrano* offered little persuasive authority, and when a court peeled back the "veneer" of the case, it would expose a fundamentally flawed argument.[415] Additionally, the government argued and focused on Mr. Santos Sanchez's unauthorized work in the 1990s before receiving TPS.[416] By working without

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404 *Id.* at *3-4.

405 *Id.* at *4.

406 *Id.*

407 *Id.*

408 The District Court in *Santos Sanchez* heavily relied upon *Medina*. *Id.* at *6.

409 *See supra* text accompanying note 361. The District Court is referring to the District Court case of Ramirez v. Dougherty, 23 F. Supp. 3d. 1322, 1327 (W.D. Wash. 2014) instead of the Ninth Circuit case of Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017).

410 *Santos Sanchez*, 2018 WL 6427894, at *4.

411 *Id.*

412 *Id.* at *5.

413 *Id.*

414 *Id.*

415 *Id.*

416 *Id.*

authorization, as the government stated, barred Mr. Santos Sanchez from maintaining lawful status in the United States.[417] The District Court, in response to the government, called out the government by stating, "[t]his reading of § 1254 does not make sense to the court."[418] The court further stated that in order for a person to maintain lawful status, an individual must first have lawful status.[419] Overall, "this Court is not fooled by the government's careful attempt to parse words in light of § 1255's clear language."[420]

The District Court, in the end, granted Summary Judgment for Mr. Santos Sanchez and Mrs. Gonzalez under the APA, and denied the government's Motion for Summary Judgment, but granted the government's Motion to Dismiss on the mandamus claims and due process violations.[421] Furthermore, the case was remanded back to the USCIS for further consideration.[422] Though the court remanded the case back to the USCIS, in February 2019, the government appealed the case to the Third.[423] Since the case is on appeal to the Third Circuit, it could spell trouble for the TPS holders in the District of New Jersey and the Eastern District of Pennsylvania.

C. Administrative Appeals Office

The Administrative Appeals Office ("AAO") is an administrative review agency that reviews unfavorable decisions by a USCIS officer or a USCIS District Director for select immigration categories.[424] The AAO regularly issues decisions as non-precedent decisions and apply current policy and law to a case.[425] In the *Matter of H-G-G-*,[426] the AAO issued a policy memorandum stating:

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417 *Id.*

418 *Id.*

419 *Id.*

420 *Id.*

421 *Id.* at *7.

422 *Id.*

423 Santos Sanchez v. Johnson, No. 16-651-RBK, 2018 WL 6427894, at *1 (D.N.J. Dec. 07, 2018), *appealed sub. nom.*, Sanchez v. Sec'y U.S. Dep't, No. 19-1311 (3d Cir. Feb. 06, 2019).

424 *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao (last updated May 04, 2020).

425 *Id.*

426 Adopted Decision 2019-01 (AAO July 31, 2019).

> For purposes of adjustment of status under section 245 of the Act, a recipient of Temporary Protected Status (TPS) is considered as being in and maintaining lawful status as a nonimmigrant only during the period that TPS is in effect; a grant of TPS does not constitute an admission, nor does it cure or otherwise impact any previous unlawful status.[427]

The purpose of the memorandum was to clarify the position of the government and provide guidance for adjudicating officers when assessing a case of whether granting of TPS overcomes the admission requirements of 8 U.S.C. Section 245(a).[428] It is the AAO's position that "TPS is not an admission for purposes of section 245(a) of the Act."[429] The USCIS and its offices are to apply this non-precedent decision "universally" when adjudicating petitions of this nature.[430] Nevertheless, the decision by the AAO is not applicable in the Sixth and Ninth Circuits since both courts have a different stance than the government.[431]

VII. DISCUSSION OF *MORENO V. NIELSEN*

In February 2019, the District Court of the Eastern District of New York issued a slip-opinion on the present case, which was unfavorable to Mr. Moreno.[432] In its opinion, the court addressed the issues as per the plaintiffs' complaint.[433] According to the District Court, the "Plaintiffs' pleading alleges that pursuant to 'a policy of refusing to find that a grant of TPS constitutes an "inspection and admission" for purposes of adjustment of status,' USCIS denies applications for adjustment of status filed by 'current TPS holders who were not "inspected and admitted" other than through the grant of TPS.'"[434] The court recognized that this policy was consistent with

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[427] *Id.* at 1.

[428] *Id.* at 21.

[429] *Id.*

[430] *Id.*

[431] *Id.*

[432] *Moreno v. Nielsen,* No. 1:18-cv-01135-RRM, 2019 WL 653139, at *7 (E.D.N.Y. Feb. 15, 2019).

[433] *Id.* at *2.

[434] *Id.* (citation omitted).

Serrano[435] but inconsistent with *Flores*[436] and *Ramirez*,[437] which accepted that the plain language of 8 U.S.C. Section 1254a)(f)(4)[438] requires that a TPS recipient be considered "inspected and admitted" under 8 U.S.C. Section 1255(a)[439] for AOS.[440] On the whole, the plaintiffs are seeking the USCIS and the District Court to endorse *Flores* and *Ramirez* and forego its dependence on *Serrano*.[441]

Next, the District Court turned to the Temporary Restraining Order ("TRO") that Mr. Moreno filed in January 2019.[442] In Mr. Moreno's motion, he states that his employer, Jersey Lynne Farms, the company that fortuitously applied for an immigrant visa, would be ceasing operations at the end of March 2019.[443] Mr. Moreno contends that once Jersey Lynne Farms ceases to operate, he would lose his job, which would make him ineligible for AOS.[444] Mr. Moreno further argues that he would have to begin the process of obtaining an immigrant visa again, which, based on past experiences, may take years.[445]

In Mr. Moreno's first attempt at obtaining an immigrant visa, it took about nine years to go through the entire process of applying.[446] The process included first filing a Labor Certification[447] with the

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435 Serrano v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011).

436 Flores v. USCIS, 718 F.3d 548 (6th Cir. 2013).

437 Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017).

438 *See supra* note 181 for statute citation.

439 *See supra* note 185 for statute citation.

440 *Moreno v. Nielsen,* No. 1:18-cv-01135-RRM, 2019 WL 653139, at *1-2 (E.D.N.Y. Feb. 15, 2019).

441 *Id.* at *3.

442 *Id.*

443 *Id.*

444 *Id.*

445 *Id.*

446 *Id.*

447 According to the USCIS, a Labor Certification is defined as follows:

> A Department of Labor certification required for U.S. employers seeking to employ certain persons whose immigration to the United States is based on job skills or nonimmigrant temporary workers coming to perform services for which qualified authorized workers are unavailable in the United States. Labor certification is issued by the Secretary of Labor and contains attestations by U.S. employers as to the numbers of U.S. workers available to undertake the employment sought by an applicant, and the effect of the alien's employment on the wages and working conditions of U.S. workers similarly employed. Determination of labor availability in the United States is made at the time of a visa application and at the location where the applicant wishes to work.

Department of Labor to receiving the 2017 denial letter from the USCIS in regard to the AOS petition.[448] Accordingly, Mr. Moreno is asking the District Court to grant the TRO, or at the very least, a mandatory injunction to again review and re-adjudicate his application.[449] In response to the TRO motion, the government calls the court's attention to the fact that the USCIS' approval of the immigrant visa will not be revoked because Jersey Lynne Farms would be going out of business.[450] The government further stated that if Mr. Moreno were to be offered new employment by another employer within the United States in a similar occupational position as with Jersey Lynne Farms, then his AOS petition would be reopened and the new employer would not need to file a new application for AOS.[451] Instead, Mr. Moreno would "only" need to file the Supplement J[452] form to the I-485[453] application.[454]

Subsequently, the District Court elaborated on the standards for a TRO and a preliminary injunction, as set forth by the Second Circuit.[455] The court states that "the standards for granting a TRO and preliminary injunction are essentially the same, a TRO 'serves a purpose different from that of a preliminary injunction.'"[456] The

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Glossary: Labor Certification, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/tools/glossary/labor-certification (last visited Feb. 17, 2020).

448 *Moreno*, 2019 WL 653139, at *3.

449 *Id.*

450 *Id.* at *4.

451 *Id.*

452 According to the USCIS, the Supplement J form is used to:

> Confirm that the job offered to you in Form I-140, Petition for Alien Worker, remains a bona fide job offer that you intend to accept once we approve your Form I 485, Application to Register Permanent Residence or Adjust Status. Beginning Jan. 17, 2017, if you are filing or have previously filed Form I-485 based on being the principal beneficiary of a valid Form I-140 in an employment-based immigrant visa category that requires a job offer, you will need to file Supplement J instead of submitting a job offer letter; OR[,] [r]equest job portability under INA section 204(j) to a new, full-time, permanent job offer that you intend to accept once we approve your Form I-485. This new job offer must be in the same or a similar occupational classification as the job offered to you in the Form I-140 that is the basis of your Form I-485.

I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j), U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/i-485supj (last updated Feb. 27, 2020).

453 *See supra* text accompanying note 29.

454 *Moreno*, 2019 WL 653139, at *4.

455 *Id.*

456 *Id.* (quoting Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 107 (2d Cir. 2009)).

District Court also goes on to elaborate that a TRO is to preserve the status quo until a court has had the chance to rule on the merits of the request for a preliminary injunction.[457] Furthermore, "[a] TRO cannot exceed fourteen days unless the district court, 'for good cause,' extends it for another period of no more than fourteen days."[458]

When applying the standards that the Second Circuit established, the District Court addressed that a court bases a TRO request on the belief that the USCIS' approval would automatically rescind Mr. Moreno's immigrant visa.[459] The court wrote that "[t]his fear is unfounded."[460] The District Court elaborated that it is unfounded because 1) though Mr. Moreno's employer is ceasing operations, the immigrant visa application is not going to be revoked, and 2) when Mr. Moreno receives a new employment offer that was similar to his position at Jersey Lynne Farms, he would need to file a Supplement J form to the I-485 for the case to be reopened by the government.[461] Therefore, "[w]hile the [c]ourt will not rule on the preliminary injunction motion until the motion is fully briefed [by Mr. Moreno], there is clearly no valid basis for a TRO at this juncture."[462]

The District Court, in its opinion, then pivoted to whether Mr. Moreno had standing.[463] In addressing the standing issue, the court began its discussion by reiterating the issues at hand, what the Plaintiffs are seeking, and why the USCIS denied Mr. Moreno.[464] While the District Court was addressing standing, the court did note that:

> Defendants' Opposition concedes that Moreno, having been paroled into the United States following his trip in 2011, meets the "inspected and admitted or paroled requirement" of § 1255(a). Defendants point out that Moreno was denied adjustment of status under §

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457 *Moreno*, 2019 WL 653139, at *4. The author of this Note has paraphrased this note, however, the District Court in its opinion quoted Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n, PAA Chapter, AFL-CIO, 306 F.2d 840, 842 (2d Cir. 1962), which was quoted in *Garcia*, 561 F.3d at 107.

458 *Moreno*, 2019 WL 653139, at *4 (quoting U.S. D.I.D Corp. v. Windstream Commc'ns, Inc., 775 F.3d 128, 132 n.2 (2d Cir. 2014)).

459 *Id.* at *5.

460 *Id.*

461 *Id.*

462 *Id.*

463 *Id.*

464 *Id.* at *5-6.

> 1255(c), which provides, in pertinent part, that § 1255(a) "shall not be applicable to . . . (2) subject to subsection (k), an alien . . . who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." Subsection (k) provides, in relevant part:
>
> An alien who is eligible to receive an immigrant visa under paragraph . . . (3) of section 1153(b) of this title . . . may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2) . . . if –
>
> (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission.
>
> Defendants contend that Moreno did not qualify for the § 1255(k) exemption because he was paroled, rather than "lawfully admitted," into the United States following the overseas trip he took in 2011 after being granted TPS.[465]

The District Court also noted that Mr. Moreno might not be able to establish causation or redressability because the relief requested in the amended complaint would not be able to redress Mr. Moreno's injury.[466] The court stated:

> USCIS never expressly considered the question of whether Moreno met the "inspected and admitted or paroled" requirement of § 1255(a) because it found that he was ineligible for adjustment of status under that subsection. Accordingly, an order declaring Moreno had been "'inspected and admitted' for purposes of 8 U.S.C. § 1255(a) pursuant to [his] . . . grant of TPS," or an injunction directing USCIS to so find, would not affect USCIS's decision. Similarly, an order declaring "that Defendants' policy of refusing to find that a grant

[465] *Id.* at *6.
[466] *Id.* at *7.

> of TPS constitutes an 'inspection and admission' for purposes of adjustment of status and all adjustment decisions issued based upon that policy are contrary to 8 U.S.C. § 1254a(f)(4)," and enjoining that policy, would be superfluous since, under other portions of volume 7, part B, chapter 2(A)(5) of the USCIS Policy Manual, Moreno met the "inspected and admitted or inspected and paroled requirement" by virtue of having been inspected and paroled into the United States following his 2011 trip.[467]

Therefore, the District Court denied Mr. Moreno's TRO motion.[468]

On May 18, 2020, the E.D.N.Y. issued another opinion in the case.[469] This time the opinion was on Mr. Moreno's preliminary injunction.[470] The District Court held that because Mr. Moreno "failed to make a 'strong showing' of irreparable harm, [his] motion for a preliminary injunction is denied."[471] If the District Court had granted the preliminary injunction, it would have required the USCIS to reconsider Mr. Moreno's petition for AOS. The USCIS would also have been mandated "to apply policies that would result in granting those applications."[472] Additionally, the E.D.N.Y. stated that "the Court need not determine whether Plaintiffs have shown a clear or substantial likelihood of success on the merits, or whether the preliminary injunction is in the public interest."[473]

VIII. ANALYSIS

In applying the preceding cases that address TPS holders in general (not TPS alien crewmen) to the Eastern District of New York

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[467] *Id.* (alteration in original).

[468] *Id.*

[469] De Jesus Moreno v. Nielsen, No. 1:18-cv-01135-RRM, 2020 WL 2523052, at *1 (E.D.N.Y. May 18, 2020).

[470] *Id*. at *8.

[471] *Id.* at *5.

[472] *Id*.

[473] *Id.* at *8. The author of this Note will not be further elaborating on the E.D.N.Y.'s decision to deny Mr. Moreno's preliminary injunction aside from this brief mention. Also, since the District Court issued the May 18, 2020 opinion after the Note was submitted for publication, the author will not be changing the analysis nor the conclusion of this Note to accommodate the new ruling.

case of *Moreno v. Nielsen,* it is clear that various circuits and district courts, other than the Eleventh Circuit in *Serrano*,[474] are ruling for TPS holders. The District Court in *Moreno* in February 2019 issued an opinion that favored the government.[475] The court, via the issued opinion, nearly dismissed the suit. However, it left an opportunity for the plaintiffs in the case to address the standing issue as posed by the court.[476] This Note supports that if the District Court in *Moreno* were to rule on the overall issue as the government originally presented it, then it would side with the Eleventh Circuit, which held that a foreign national who received TPS could not go through AOS.[477]

Furthermore, the court, if it were to rule on the original issue, would be giving the USCIS the deference the United States Supreme Court afforded it under *Chevron*[478] and *Skidmore*[479] Deference would be a dangerous and costly mistake by the District Court to set a precedent because of the plain language of 8 U.S.C. Section 1254a(f)(4) supports the granting of TPS as admission into the United States, thus making a TPS recipient eligible for AOS under 8 U.S.C. Section 1255. In the *Matter of Areguillin*,[480] the BIA held that an "admission" into the United States happens when an inspecting customs officer conveys to the foreign national that a determination has been made on whether he or she, as the applicant, is admissible or inadmissible into the country.[481] The BIA further clarified that the communication of admissibility takes place when a customs officer permits the foreign national to pass through the port-of-entry.[482] By the USCIS granting TPS upon a foreign national or if a foreign national were to be paroled into the United States at a port-of-entry when in possession of TPS status, the government, in essence, is informing that foreign national that he or she is admissible/admitted.

In addition to the "'language itself, the specific context in which the language is used, and the broader context of the statute as a whole,' shows that Congress's clear intent was that a TPS beneficiary

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474 Serrano v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011).

475 *Moreno*, 2019 WL 653139, at *7.

476 *Id.*

477 *See generally Serrano*, 655 F.3d 1260.

478 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

479 Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).

480 17 I. & N. Dec. 308 (B.I.A. 1980).

481 *Id.* at 310 n.6 (citing Matter of V—Q—, 9 I&N Dec. 78 (BIA 1960)).

482 *Id.*

is afforded with a pathway to LPR status."[483] Moreover, the BIA's opinion in the *Matter of Quilantan*[484] further supports Congress's clear intent.[485] In the *Matter of Quilantan*, the BIA stated "that Congress expressed its intention to broaden the statute 'so as to include all aliens (other than alien crewmen) who have been inspected and admitted or who have been paroled into the United States, thereby providing considerably more flexibility in the administration of the law.'"[486] Also, the BIA elaborated that Congress intended to continue to allow foreign nationals who physically bestowed themselves for questioning and were admitted by a customs officer at a port-of-entry to have fulfilled the requirement of "inspected and admitted."[487]

Nonetheless, the proceeding scenarios all pivot on if the District Court were to rule on the initial issue. In actuality, *Moreno* is heading for a dismissal, which in turn might or might not be beneficial to TPS holders who are seeking to go through the AOS process. Additionally, on October 3, 2019, the government submitted a letter to the District Court informing the court of the government's supplemental authority in the case.[488] In the letter, the government attached the *Matter of H-G-G*[489] as an exhibit, and on October 15, 2019,[490] the government submitted a letter clarifying the applicability of *Matter of H-G-G-* to *Moreno*.[491] With the government filing of the applicability of *Matter of H-G-G-* and the District Court's initial opinion, it reaffirms the possible notion that the case is heading for an adjournment.

If the case were to be dismissed by the court, then it would allow the plaintiffs to appeal to the Second Circuit on the earlier issue. If the Second Circuit were to rule affirmatively in favor of the plaintiffs, it would essentially authorize TPS holders within the States of Connecticut, New York, and Vermont the right and the ability to go through AOS and thusly become an LPR. On the other hand, if the

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483 Flores v. USCIS, 718 F.3d 548, 552 (6th Cir. 2013).

484 25 I&N Dec. 285 (BIA 1980).

485 *Id.* at 289

486 *Id.* (quoting Matter of Pires Da Silva, 10 I&N Dec. 191, 193 (BIA 1963)).

487 *Matter of Quilantan*, 25 I&N Dec. at 287-88.

488 Letter Respectfully Informing the Court of Supplemental Authority, Moreno v. Nielsen, No. 1:18-cv-01135-RRM (E.D.N.Y. Oct. 03, 2019), ECF No. 61.

489 Matter of H-G-G-, Adopted Decision 2019-01 (AAO July 31, 2019).

490 Letter Clarifying the Applicability of Matter of H-G-G-, Moreno v. Nielsen, No. 1:18-cv-01135-RRM (E.D.N.Y. Oct. 15, 2019), ECF No. 63.

491 *See* source cited at *supra* note 483.

Second Circuit were to rule against the plaintiffs, it would bar TPS recipients within the Second Circuit states from potentially becoming an LPR and thusly opening up TPS to the possibility of deportation when their program expires. Additionally, if the USCIS had originally stipulated that Mr. Moreno met the "admission" requirements under 8 U.S.C. Section 1255(a) because he was paroled back into the United States in 2011,[492] then the need for the current, pending litigation most likely would not have been filed.[493]

The Eastern District of New York must analyze the entire procedure of allowing TPS holders the ability to go through the AOS process so that foreign nationals who hold TPS may continue to have lawful status within the United States in its final determination.

IX. CONCLUSION

The Eastern District of New York should rule for Mr. Moreno, with or without class certification. The District Court should acknowledge that a foreign national who entered the United States without "inspection and admission,"[494] but who subsequently was granted TPS by the government, has satisfied the examination and admittance requirement as set forth by statute to adjust one's status. If the District Court does not deem the granting of TPS as "inspection and admission" into the United States, it could spell trouble for future cases in other districts and circuits because it would act as an adverse persuasive authority. Further, it would open the floodgates for mass deportations by the government of TPS holders within the Eastern District of New York, which would evolve into far-reaching effects. Undoubtedly, the Second Circuit would likely address the issue on appeal.

It is clear that with the ending of most TPS programs, hundreds of thousands of foreign nationals will lose legal status within the United States. Foreign nationals have an avenue to keep lawful status,

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[492] *See supra* note 465 for how the E.D.N.Y. addressed the standing issue.

[493] In lieu of the opinion by the District Court in *Moreno*, I reached out to both the plaintiffs and defendants in the case and asked for their thoughts and comments on the opinion. I also inquired if the court were to rule against their party, if that party would appeal to the Second Circuit. The defendants responded that it was the government's position to not comment on pending litigation. The plaintiffs responded that it was not their position to speculate on how the District Court may finally rule. Neither party commented on an appeal to the Second Circuit.

[494] *See supra* note 18 for an explanation of "inspection and admission."

the Adjustment of Status process. Nonetheless, foreign nationals are facing legal road-blocks left and right created by the United States government because of the USCIS' interpretation of the TPS statute. Courts must grant foreign nationals the right to go through the AOS process. Otherwise, a citizen of another nation will be subject to removal via deportation from the United States.